UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARBOR RECYCLING/ARBOR LITE LOGISTICS,
A SINGLE EMPLOYER

and

AMALGAMATED LOCAL 1931

Case 02–CA–180470
02–CA–186760
02–CA–186930
02–CA–188504
02–CA–195794

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DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in New York, New York on May 22, 23, 24, and July 13, 2017. The Amalgamated Local 1931 (Union) filed unfair labor practice charges on July 19, October 24, and November 18, 2016[1] and the National Labor Relations Board (NLRB) for Region 2 issued an order consolidating the cases and a consolidated complaint and notice of hearing on February 27, 2017. An answer was timely filed by the Respondent on March 13, 2017. On March 27, 2017, the Union filed another charge and on May 2, 2017, the Region issued an order further consolidating the cases and an amended consolidated complaint and notice of hearing. The Respondent filed a timely answer in response to the amended consolidated complaint (GC Exh.1B).[2]

The consolidated and amended complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) when the Respondent (1) threatened employees with discharge because of their support of the Union in or about July, August, and October, 2016; (2) threatened employees with unspecified reprisal because of their support of the Union on about July and August 2016; (3) interrogated employees about their support of the Union on

[1] All dates are 2016 unless otherwise indicated.

[2] The General Counsel exhibits are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief for the General Counsel is identified as "GC Br. The Respondent's brief is identified as "R. Br." The hearing transcript is referenced as "Tr."

about August and October 2016; (4) engaged in the surveillance of employees who were engaged in union activities in July, August, and September, 2016; and (5) threatened employees with loss of wages and hours because of their support of the Union. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employees Joel Espinosa Almonte on August 22, 2016; Rafael Rosario Guance on September 7, 2016; and Jose Luis Urbaez on October 14, 2016 (GC Exh. 1P).[3]

On the entire record, including my assessment of the witnesses' credibility[4] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondents Arbor Recycling and Arbor Lite Logistics (collectively, Arbor Recycling), a New York domestic corporation, with an office at 720 Garrison Avenue, Bronx, New York, and two affiliated business enterprises located at 1120 and 1111 Grinnell Place, Bronx, New York, which are located across the street from one another and a facility located at 135 Pine Aire Drive, Bayshore, New York, have been engaged in the business of recycling and transporting plastic materials where it derives gross annual revenue in excess of $50,000 from picking up and processing recyclable materials to and from customers located outside the State of New York.

The Amalgamated Local 1931 is a labor organization within the meaning of Section 2(5) of the Act.

II. SINGLE EMPLOYER STATUS AND STIPULATIONS

Paragraph 3(a) and (b) in the complaint alleges that Respondent Arbor Recycling and Respondent Arbor Lite is a single-integrated business enterprise and a single employer within the meaning of the Act. In its answer, Arbor Recycling and Arbor Lite deny holding themselves out as a single-integrated business enterprise and deny they are a single employer within the meaning of the Act (GC Exh. 1R).

The Respondents operate recycling and processing centers of plastics, aluminum, and glass materials at 1111 and 1120 Grinnell Place, Bronx, New York. There is also an office used by both entities located at 720 Garrison Avenue, Bronx, New York, which is situated ½ city block northwest from 1111 and 1120 Grinnell Place. There are 18–20 employees at the two

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[3] The counsel for the General Counsel subsequently withdrew the allegation in par. 13(a) of the complaint that Almonte was discharged in violation of the Act and modified par. 12 in the complaint to withdraw the word "hour" and thus, to read as follows, "threatened employees with loss of wages because of their support of the Union" (Tr. 387).

[4] Witnesses testifying at the hearing included Ralph Martucci, James Vogt, Rafael Rosario Guance, Giscard Bourgeios, Jose Luis Urbaez, Cosmo Lubrano, Gustavo Moya, David Vallejo, and David Vega.

facilities and 12 employees at a third facility located in Bayshore, New York. The employees are warehouse workers, drivers and/or drivers' assistants. There are 15 trucks with 15 drivers in at the Bronx facilities with 10 assistants. There are eight drivers with four assistants at the Bayshore facility. All other employees work in the warehouses. The workers are on two shifts from 7 a.m. to 3:30 p.m./4 p.m. and from 2/4 p.m. to 11 or 11:30 p.m. The truckdrivers work one shift from 7 a.m. until they finish transporting the recycled materials. There is one automotive mechanic for the facilities and he usually starts at 6 a.m. on an 8-hour shift with frequent overtime hours. The Bayshore facility has one shift that starts in the morning (Tr. 25–36).

The Board applies four factors in determining whether separate entities constitute a single employer: (1) interrelations of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. No one factor is controlling, nor do all need to be present to support a single employer finding. However, the Board has held that the first three factors are more critical than the last, and further that centralized control of labor relations is of particular importance because it tends to demonstrate "operational integration." See *Denart Coal Co*., 315 NLRB 850, 851 (1994), enfd. 71 F.3d 486 (4th Cir. 1995). No single factor is controlling and all factors need not be present. See *Three Sisters Sportswear*, 312 NLRB 853, 861 (1993), and cases cited there, enfd. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996). Single employer status is characterized by the absence of an arm's length relationship found among unintegrated companies. *RBE Electronics of S.D.,* 320 NLRB 80 (1995); *Hydrolines, Inc.,* 305 NLRB 416, 417–419 (1991).

At the hearing, the parties stipulated (Tr. 9) to the following

> Arbor Recycling and Arbor Lite Logistics at all material times have been affiliated business enterprises with common officers, ownership, directors, management and supervision have formulated and administered a common labor policy, have share common premises and facilities, have interrelated operations in the collection, transporting and recycling of plastic, glass and aluminum materials and constitute a single employer engaged in commerce within the meaning of Section 22, 26, and 27 of the Act.

The Respondent admits that the companies have been affiliated business enterprises with common officers, ownership, directors, management and supervision, have formulated and administered a common labor policy have shared common premises and facilities, have interrelated operations in the collection, transporting and recycling of plastic materials (GC Exh. 1R). Ralph Martucci (Martucci) testified that he was and is the president of Arbor Recycling and Arbor Lite Logistics. He testified that both companies share the same equipment, operates from the same premises and have interrelated operations, with Arbor Lite being the trucking company that picks up the recyclable plastics for Arbor Recycling to process in the shared premises (Tr. 26-33).

There is no doubt that Arbor Lite Logistics and Arbor Recycling have common management and common ownership. There is also evidence of an inter-relationship of operations in that the two companies used the same premises, equipment and employees to transport and process plastic materials. It is also true that the relationship between Arbor Lite and Arbor Recycling was not arm's-length, a factor sometimes described as the hallmark of

single employer status. As such, the parties stipulated and I find that Arbor Lite and Arbor Recycling are a single-integrated business enterprise and a single employer within the meaning of the Act.

The parties further stipulated (Tr. 9, 10) that following are supervisors and/or agents of the Respondent under 2(11) and 2(13) of the Act

Ralph Martucci is the owner and president of Arbor Lite Logistics and Arbor Recycling.
Richard Rogich was and is the operations manager.
David Vallejo was and is a supervisor and manager.
Wellington Mercado was and is the night shift facility manager.
Rocco Mongelli was and is a facility manager.
Sammy Lopez was and is a facility manager.
Edward Martindale was and is a facility manager.
David Vega was and is the assistant to David Vallejo and an agent of the Respondent within the meaning of 2(13) of the Act.[5]

III. THE UNFAIR LABOR PRACTICES

1. The Alleged Surveillance of Employees at the Bronx Facilities in July, August and October Because of Their Support of the Union

Paragraph 11 of the consolidated and amended complaint alleges that Sammy Lopez, Ed Martindale,[6] Wellington Mercado, and David Vega about July and August 2016 engaged in surveillance of employees by either taking a video or standing by employees engaged in union activities (GC Exh. P).

The June Interaction Between the Union and the Respondent

Cosmo Lubrano (Lubrano) testified that he was formerly the president of amalgamated local 1931 from 2013 until February 2017. He testified to attending a union activity in early June 2016[7] near the Respondent's warehouse with his vice president, Charles Clemenza, when he was approached by a worker employed by the Respondent and Lubrano was asked about organizing the Respondent's workers. Lubrano did not identify this person but said he gave out information about the Union and handed and collected union card applications. Lubrano believed that he met with the workers in early June between 9–10 a.m. on 1111 Grinnell Place

[5] The parties did not stipulate that Clesio Rodriguez Da Silva (Da Silva) was and is a Sec. 2(11) supervisor or an agent under 2(13) of the Act (Tr. 7, 11; par. 7b of the consolidated and amended complaint at GC 1(P)). This individual has also been identified as "Hinder Brando Souto," "Glasen," "Galacio" and "Glessio" by various witnesses. It was stipulated that Da Silva is a salaried employee (Tr. 405; GC Exh. 23).

[6] Ed Martindale was replaced with Clesio Rodriguez Da Silva in the General Counsel's motion to amend on May 17, 2017 (GC Exh. 1X).

[7] Lubrano's NLRB investigative affidavit stated that he first went to the Respondent's Bronx facilities in mid-June. In testimony, Lubrano insisted that early June could also be considered as mid-June (Tr. 346–348).

near a makeshift table that was set up by the Union for the employees to enjoy their lunch and breaks (Tr. 295–297).[8]

Lubrano said that an individual who identified himself as a supervisor and his name as "Fuck you Danny" approached him and Clemenza while he was handing out and collecting the union cards. Lubrano testified that Danny told them to leave because the employees were busy working and to return either before 7 a.m. or after 2 p.m. Lubrano and Clemenza complied with his request. Lubrano recalled nothing else from this encounter with Danny (Tr. 297, 298).

Lubrano and Clemenza returned the next day, along with another union organizer named Mike Aviles between 6–7 a.m. to 1120 Grinnell Place to hand out more union cards. The organizers did not speak to the workers. On this second occasion, the union representatives encountered Supervisor Sammy Lopez and "Fuck you, Danny." Lopez allegedly told them that he was "pro-union" and Danny reminded them to leave by the start of the 7 a.m. work shift. Lubrano recalled that nothing else was said. Lubrano testified that he and other representatives visited the Respondent's facilities on other occasions in June. Lubrano did not state how often in June and did not recall speaking to the workers. Lubrano said they had tried to speak to the workers but did not say why the union representatives were unable to speak with the workers. Lubrano testified that Danny grew more hostile and did not want them there. However, Lubrano could not recall how Danny was hostile to the union representatives or what was said that caused him to believe that Danny was hostile to the union (Tr. 299–301).

The Alleged July 18 Surveillance

Lubrano returned to the Bronx warehouses on July 18 from 6 a.m. until 3 p.m. with Clemenza, Aviles, Joseph Giavinco (Giavinco), and several other union representatives. Lubrano stated that they were situated near 1120 Grinnell Place and were able to speak to the workers. Lubrano stated that he observed Supervisor Lopez and another individual whom the workers identified to him as Supervisor Eddie Glasen[9], watching them from 5–10 feet away while they were speaking to the workers (Tr. 301–305).

The counsel for the General Counsel proffered a photograph taken on July 18 by Lubrano with his cell phone that showed Da Silva, with the reflective vest and clipboard, looking at a worker who was using Giavinco's back for support as the worker allegedly completed a union card with another union organizer looking on. This picture was taken around noon time. Lubrano testified that neither Lopez nor Da Silva spoke to any of the union representatives (Tr. 304–307; GC Exh. 3).

The counsel for the General Counsel proffered a second photograph with a date and time stamp of July 18 at 1:42 p.m. taken by Lubrano with his cell phone of Da Silva. Da Silva is shown holding up two fingers with each hand looking at Lubrano. There is nobody else in the picture and Lubrano did not recall if anyone else was with him or around him when the picture

[8] Counsel for the Respondent identified that 1120 Grinnell Place is a red brick building (Tr. 298).

[9] As noted above, Eddie Glasen is Da Silva.

was taken. Lubrano did not exchange any words with Da Silva before or after this picture was taken (Tr. 306–309; GC Exh. 19).

Lubrano also testified that another supervisor, who was identified as Ed Martindale, had requested a union poster that was on a telephone pole. When Lubrano replied in the negative, it is alleged that Martindale tore the poster down over Lubrano's protest (Tr. 306).

The Alleged July 19 Surveillance

Lubrano recalled going back to the Bronx warehouses between 6–7 a.m. with Giavinco, Aviles, and Jim Vogt, also a union representative on July 19. At 6:15 a.m., Lubrano took a photograph of David Vega (Vega). Lubrano explained that the union representatives were walking up and down Grinnell Place when he observed Vega taking a video of them while talking with the workers. Lubrano insisted it was a video that Vega was taking because he was moving his phone around. Lubrano testified that Vega was with Lopez, "Danny" and Da Silva in front of the bay doors at 1120 Grinnell Place (red brick building) and he was 5–10 feet away from Vega. Lubrano then crossed the street opposite to1120 and took a few pictures of Vega and the other supervisors (Tr. 310; GC Exh. 9). The counsel for the General Counsel offered the same photograph, identified in General Counsel's Exhibit 20. The date and time stamp of this photograph indicated it was taken by Lubrano on July 19 at 6:22 a.m. (and not 6:15 a.m. as he testified earlier). Lubrano identified the individuals in the photograph (in GC Exh. 9 and 20) as Vega taking a picture (or video) of Lubrano and he identified the two union representatives as Vogt wearing the light colored pants and Giavinco, dressed in dark colored clothes, with Da Silva behind the union officials (Tr. 310–314).

On cross-examination, Lubrano admitted that he was not certain if Vega was actually taking a video or picture of him. He also admitted that there were no employees in the picture and no one else was around him when he took the pictures proffered in General Counsel's Exhibit 9 and 20 (Tr. 378, 379).

Before Lubrano took the picture of Vega, Lubrano had taken an earlier picture at 6:10 a.m. showing a table set up by the Union next to the bay doors of 1120 Grinnell Place. Lubrano stated that he was standing to the right of the picture and across the street in front of 1111 Grinnell Place. In this picture, Aviles, with his hands on his hips, was looking over to the shoulder of an unidentified worker. There are no supervisors in the picture, but Lubrano represented that this was when Vega was taking his video of Lubrano. Lubrano believed that Vega was also taking a video of the individuals at the union table. Lubrano testified that he believed Giavinco, Vogt and/or Aviles may have told Vega not to take pictures or videos of the employees speaking to the union representatives (Tr. 319–322; GC Exh. 21).

James Vogt (Vogt) testified that he was and is a business agent for Eastern States Joint Board.[10] Vogt said that he was asked by Lubrano to help organize the workers at the Bronx facilities. Vogt arrived to distribute information about union benefits on July 19, 2016, with Lubrano around 7 a.m. Vogt said they parked on the corner of Grinnell and walked down the

[10] The Eastern States Joint Board is an umbrella labor organization with various locals, including Amalgamated Local 1931, that are affiliated with the organization.

block to the building identified as 1120 Grinnell Place (Tr. 71). Vogt said they walked to the front entrance of the 1120 Grinnell Place building to give out informational flyers to the drivers (Tr. 47–49, 69).

Vogt recalled that "fuck you Danny" started to yell and scream at Lubrano. Vogt said that factory workers and the drivers witnessed the screaming by Danny. Vogt said that Supervisor Sammy Lopez and Vega were also present. Vogt did not describe the cursing or what Danny was yelling about. Vogt tried to calm Danny down and made cordial conversation. Vogt also observed Vega taking a picture while he and Giavinco were standing by the bay doors at 1120 Grinnell Place. Vogt said this occurred at 6:22 a.m. on July 19. Vogt testified that in a photograph identified in General Counsel's Exhibit 9; he was wearing beige pants while standing next to Giavinco, who was dressed in dark clothing. Both were watching as Vega was allegedly taking a picture. Vogt testified that Vega was taking a picture of him. In turn, Vogt said he took a picture of Vega taking a picture of Vogt and sent that picture to Lubrano's cell phone. Vogt said there were no workers present when Vega was taking the picture. Vogt did not testify that he told Vega to stop taking pictures. Vogt said he and Giavinco were having a cordial conversation with Vega and another supervisor, whom he failed to identified. Vogt spent a couple of hours at the Bronx facilities and then left (Tr. 49–58).

David Vega (Vega) testified that has been employed by the Respondent for over two years and is presently the assistant to Vallejo (Tr. 515). Vega denied that he was taking a video of the union representatives on July 19 (GC Exh. 9). Vega said that one of the night time trucks were returning that morning and that Lubrano and two other union representatives were running to the truck and tried to talk with the driver. Vega admitted videoing the interaction because of safety concerns that Lubrano or the others may be injured if the truck failed to stop (Tr. 529, 530–533).

The Alleged July 25 Surveillance

Lubrano testified that he arrived at the Bronx facilities with Clemenza, Aviles, and Vogt July 25 at approximately 8 p.m. The union representatives were hoping to catch some of the second shift workers during their lunch/breaks so they stood outside by the break area alongside the 1120 Grinnell warehouse. The union representatives set up a table with food for the workers approximately 5-10 feet from the side of the bay door entrance at 1120 Grinnell Place (Tr. 371–373). Lubrano said he noticed a supervisor, who he identified as Wellington Mercado (Mercado), taking photographs or videos of the employees speaking with the union representatives. Mercado was standing in the middle of the street while taking his pictures. Lubrano was standing on the sidewalk and Mercado was in the street as the other union representatives were talking with the workers. Lubrano believed Mercado was taking photographs because he noticed the flash on the cell phone when a picture was taken. Lubrano decided to take his own picture of Mercado while Mercado was photographing the workers and union representatives. Lubrano identified Mercado as the individual in General Counsel's Exhibit 10. In the picture, Mercado is seen holding up his cell phone and smiling at Lubrano's camera. There were no one else in the picture when it was taken. Lubrano said he was 10-15 feet away when he took the picture of Mercado and observed Mercado using his cell phone to take pictures/ videos for about 3-5 minutes (Tr. 322–326).

Lubrano denied that his parked vehicle was blocking the street preventing the trucks from egression and ingression the two warehouses. Lubrano also denied that Mercado was taking his picture to show that the union representatives' car was blocking part of the street preventing the trucks from turning in and out of the bay entrance. Lubrano said he was standing in front of the union table when he took a picture of Mercado and believed the other union representatives may have been behind him at the table. Lubrano could not recall if any workers were standing near him when Mercado took his picture (Tr. 379–381).

Vogt testified that he went back to the 1120 Grinnell Place warehouse with Lubrano on July 25, 2016, to meet with employees on the second shift. Vogt observed workers and Supervisor Mercado were present.[11] Vogt said they parked at Garrison and Grinnell Place and walked down the street to the front of the 1120 building. Vogt said he observed a dark vehicle drive up and down the two-way street. Vogt said that the windows of the vehicle were dark but he observed that one of windows was slightly rolled down and he observed flashes as if someone was taking pictures of the union organizers. The vehicle then drove off. Vogt tried to make cordial conversations with Mercado but he was busy directing the workflow and traffic with the Respondent's trucks on the street. Vogt said that he observed Mercado taking pictures of the union representatives. Vogt believed that he was standing 20 feet away from Mercado (Tr. 52–55, 58, 59). Vogt admitted that he was aware that supervisors often need to cross the street to work in both warehouses and was aware that Mercado was directing and moving trucks on July 25 (Tr. 70, 74).

The parties stipulated and David Vallejo (Vallejo) testified that he was and is a supervisor of the drivers and a manager with the Respondent.[12] Vallejo's office is located at 1120 Grinnell Place. Vallejo is frequently crossing the street between 1120 and 1111 Grinnell Place because of his responsibilities over the drivers and as a manager overseeing their work and in dispatching the trucks (Tr. 443–448).

Vallejo testified that he was aware that the Union was present in front of the two warehouses in July and that the Union had set up a table where the workers may have their lunches outside of 1120 Grinnell Place. Vallejo denied taking any pictures of employees speaking with the Union. Vallejo also denied that any workers were disciplined or threatened with discipline for speaking with the Union.

At the hearing, Vallejo was shown General Counsel's Exhibit 10 (the picture of Supervisor Mercado purportedly taking a picture of Lubrano). Vallejo said he was not present on the day the picture was taken but was able to describe that Grinnell Place is a two-way street and believed that the vehicles parked behind Mercado was facing the wrong direction. Vallejo further stated that the park cars would have interfered with the ingress and egress of the trucks and that traffic cones are usually place along the streets near the bay doors of 1111 Grinnell Place to prevent the cars from parking (Tr. 497–504; GC Exh.10, R. Exh. 4: showing the placement of traffic cones near the bay doors).

[11] The actual date was July 25 although the counsel for the General Counsel questioned Vogt about the events occurring on July 26 (Tr. 52).

[12] Vallejo testified in Spanish with a language interpreter.

2. The Respondent's Petition to Employees at the Bayshore Facility in about January and/or February, 2017 to Revoke Their Support for the Union

Paragraph 14 of the consolidated and amended complaint alleges that the Respondent, by its manager and/or agent, Rocco Mongelli, instructed employees in January and/or February 2017 to sign a petition to revoke their support for the Union in violation of Section 8(a)(1) of the Act.

Lubrano testified that it received a text from Giscard Bourgeios, who was a driver at the Respondent's Bayshore facility, on February 27, 2017. Lubrano said that he was informed by Bourgeios that the Respondent was circulating a petition to the employees to revoke their support for the Union (Tr. 326, 327; GC Exh. 22). The complete text states

> So today there (they're) passing around a paper to sign that we are not in support of the union. It was presented as, we have to sign it. I refused of course and am probably anticipating some retaliation. Since the election has been called off Ralph (Martucci) has said that he still cannot do anything for is (us) because of the pending NLRB case. Not sure if that is true. They have also been cracking down on overtime recently.

In response to the text, Lubrano replied in a text

> They can't make you sign anything. They never planned on giving you guys anything. As with all the other nonsense they told you guys, you're all going to see that they're always going to be full of shit. Let me know if they retaliate against anyone. I'm filing charges against them.[13]

Lubrano testified that he spoke to Bourgeios, but does not recall when. Lubrano also stated that he never received a copy of the petition and has not seen the petition since the time of the text from Bourgeios (Tr. 355, 356).

Giscard Bourgeios (Bourgeios) testified that he has been a driver at the Respondent's Bayshore facility since September 2015. Bourgeios is no longer employed with the Respondent at the time of the hearing. He stated that Rocco Mongelli (Mongelli) was the manager of the facility until April 2017. Bourgeios testified he met Lubrano in July 2016. Bourgeios did not recall their conversation, but said that Lubrano gave him an application for union membership. Bourgeios testified he did not immediately act on the application, but signed the union card when Lubrano revisited the Bayshore facility on July 21 (Tr. 142–145; GC Exh. 11). Bourgeios testified to the events leading to Mongelli's request for him to sign the Respondent petition to revoke support for the Union.

Bourgeios testified that the Respondent convened four meetings at the Bayshore facility to discuss matters regarding unions in general and Local 1931 in particular. Bourgeios recalled

[13] The counsel for the Respondent requested that the entire reply by Lubrano to Bourgeios be included as part of GC Exh. 22. By testimony provided by Lubrano, his complete reply was made part of the record (Tr. 326–330).

that the first meeting was held on January 6, 2017 and all employees were present. He said that no managers were present and a consultant spoke to the group about union initiation fees; that there were no benefits in having a union; that unions would reduce the workers' overtime by forcing the employers to hire more employees and provided information on voting procedures in an election. A second meeting was held on January 27 and two consultants were present. There were no managers or supervisors present. Bourgeios said that the group was divided into two separate meetings and one consultant spoke to the English-speaking workers and the second one spoke in Spanish to the Spanish-speaking workers. Bourgeios said he attended the English-speaking group and that the consultant covered the same items as in the first meeting (Tr. 147–152).

A third meeting was held on February 3 and Ralph Martucci was present at this meeting. Bourgeios said that Martucci spoke negatively about Local 1931. According to Bourgeios, Martucci stated that Local 1931 was stealing money to reorganize and that there were discrepancies between the Local's assets and its pension funds. Bourgeios said the union organizing was a "wake-up" call for him and that things will get better if they did not vote in Local 1931. Bourgeios said that a fourth meeting occurred on February 10. Bourgeios said that Martucci was present along with the two consultants. Bourgeios recalled that the meeting was about voting procedures and that Martucci read from a prepared statement. Bourgeios recalled that Martucci stated that "…he had put the business over the employees. And that…he valued us as employees" (Tr. 152-157).

Bourgeios testified that he was approached by Mongelli on the work floor on February 27, 2017. Bourgeios was asked by Mongelli to go to his office to sign a document. Bourgeios did as instructed and he was then presented with a petition and Mongelli asked him to sign the petition. The petition was for the workers to revoke their support of Local 1931. Bourgeios said he only read the first two lines of the petition and left the office. Bourgeios did not sign the petition, but said he was "curious" what the rest of the petition stated and returned to Mongelli's office to read the rest of the document, but when Bourgeios returned, there was only a Spanish version of the petition. Bourgeios said he made a copy of the Spanish-version of the petition (Tr. 157–160; GC Exh. 12).

The English version of the petition states

> The undersigned employees do not wish to be represented by the Union Amalgamated Local 1931 AFL–CIO Affiliated with I.U.A.N. Union. They do not want to join the Union and do not want to support the Union whatsoever.
>
> In the event that some of the undersigned have previously signed at any point an authorization card or have indicated somehow a support for union representation, the undersigned hereby revoke that card effective immediately. More specifically, our Employer, the Union and any third parties or arbitrators are hereby NOTIFIED that any of the cards that had been signed by any of the undersigned are here annulled and render without effect.
>
> In the event that at some point our Employer recognizes the union as the bargaining representative of the employees, we the undersigned, hereby, ask the National Labor

Relations Board to conduct a decertification election to determine if the majority of the employees wish to be represented the Union.

There are a couple of lines and three columns for the workers to print their name, sign the petition and to date when the petition was signed below the petition.[14]

Bourgeios also complained that he was approached by a supervisor named Ed Martindale (Martindale) on April 25, 2017, and was asked about a knit cap he was wearing that had "1931" embossed on the front of the cap and "Vote Yes" on the back. Martindale asked Bourgeios if he was wearing a "union hat" and Bourgeios responded, "yes." According to Bourgeios, Martindale then said that ". . .by me wearing that hat, it's a kick in his balls, and if I only knew what the union did to him" and he demanded that Bourgeios not wear his union hat. Bourgeios did not respond. On a second occasion two days later, Martindale again approached Bourgeios and asked if liked the Union and Bourgeios replied, "a little." Bourgeios was still wearing his union hat. Nothing else was said that Bourgeios could recall (Tr. 166–169).

3. The Respondent's Threats, Interrogation and Discharge of Rafael Rosario Guance and Jose Luis Ubraez

Paragraphs 8, 9, and 10 in the consolidated and amended complaint allege that David Vallejo, David Vega, and Wellington Mercado threatened employees with discharge, threatened employees with unspecified reprisal because of their support for the Union and interrogated employees on their support of the Union (GC Exh. P).

The Alleged Threats, Surveillance and Interrogation of Rafael Rosario Guance

Rafael Rosario Guance (Guance) testified[15] that he started working in the Bronx warehouse loading and unloading the trucks in June 2015 during the night shift under Wellington Mercado. By August 2015, Guance was on the morning shift, starting at 6:30/7 a.m. and working as a driver's assistant. Guance testified that he was walking to work at 6:30 a.m. in August when he was approached by the union representatives. Guance testified that he met the union representatives on Garrison Place and 156 Street. He also did not recall how many organizers were present or their names, except for one whom he identified as "Mike." He testified that no one else was in the vicinity except for the union organizers and himself. Guance testified that someone from the Union spoke to him about the benefits of having a union and asked if he was interested in joining the Union (Tr. 76–78).

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[14] The Spanish version of the petition was the only one available and proffered by the counsel for the General Counsel. The Spanish version was translated by a Board interpreter and certified as an accurate translation. The counsel for the Respondent objected to the accuracy of the translation. I allowed the document subject to any dispute over the accuracy of the translation after a review by the Respondent. There were no subsequent disputes over the accuracy of the translation (Tr. 164–169).

[15] Guance testified in Spanish with a language interpreter.

Guance testified that he met with the union representatives a second time 1 or 2 weeks later at approximately 6:30 a.m. on Garrison and Grinnell Place. Guance said he was standing near 1120 Grinnell Place. Guance said there were six or seven coworkers present at this second encounter. On this occasion, Guance received a union card from an unidentified union representative and he proceeded to place the card application in his pocket and continued his walk to work. Guance did not testify to any conversations he made of had with the union representatives or with his coworkers. Guance said he signed the card at home and mailed it to the Union the following day. Guance said he did not sign the card on the spot because he observed Vega was looking at him in an "unusual way" for 5 minutes from across the street and approximately 20 feet away. Guance insisted that Vega had an "accusatory face" and that it was not his normal expression. Guance believed that Vega was checking on all the workers that were gathered around with the union representatives. Guance admitted that Vega was taking a smoke break and that he would oftentimes work outside the building or cross the street to the second warehouse. Guance testified that Vega had observed him for less than 5 minutes (Tr. 77–81, 113–115, and 122–130).

On the same day, after receiving his union card application, Guance said he spoke with the other workers about the benefits of the Union during their break. They discussed conditions in the bathroom and their lack of paid vacation. Guance testified that Vega walked by and said to the workers that they "should be careful in signing the card." Guance said no one responded and they continue to eat their lunch. Guance said he received the union card 1 or 2 weeks after his initial encounter with the union representatives (Tr. 81–87).[16]

Guance said that the next encounter with Vega over the Union occurred 4 or 5 days later in August. Guance was again told by Vega to be careful in signing the union card and that Guance ". . . could have problems with the company". Guance said no one was present on this occasion (Tr. 88-89).

Guance testified to a third occasion, this time with Vallejo, approximately a week prior to his discharge.[17] Guance said he went into Vallejo's office regarding a business invoice and during their conversation, Vallejo asked if he had signed the union card. Guance responded "yes." Vallejo did not say anything and Guance then left the office (Tr. 89-91).

Vallejo testified that Guance as an assistant to the driver in loading and unloading the trucks. Vallejo denied that he knew that Guance supported the Union. Vallejo denied that he observed or was aware that Guance received a union card from a union representative. Vallejo denied anyone told him that Guance signed a union card. Vallejo denied knowing that Guance had worn a union hat and/or shirt a week before his discharge (Tr. 466).

Vega said that he smokes but denied that he observed Guance meeting with the union representatives on Grinnell Place or that anyone handed him a union membership application.

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[16] Guance testified that he signed the union card in mid-August. The counsel for the Respondent requested a copy of the union card application, but it was not in the possession of the General Counsel or the Union. Guance's union card was never produced at the hearing (Tr. 111-113).

[17] Guance testified the conversation occurred "Like a week before December 7" (Tr. 90), but clearly, Guance meant September 7.

Vega said that he never observed Guance speak to the union representatives during the time he was smoking in front of 1111 Grinnell Place. Vega denied that he spoke to Guance or to a group of workers about Guance signing a union card and denied telling them "to be careful about signing a union card" (Tr. 522, 523).

The Discharge of Guance

Guance was the assistant to truckdriver Oliver Germosen (Germosen) on September 6. The truck was making a pickup of materials at a client's facility. It is undisputed that the truck struck a pillar at the entrance to the facility. Guance said he was outside of the truck and the truck was hit on the driver's side and one of the headlights and bumper were damaged. Guance insisted to Germosen to report the accident to the Respondent, but Germosen responded "no" because he already had two accidents and Vallejo would fire him over his third accident. Germosen told Guance that he was going to write up a fake report that another vehicle had hit the truck. Germosen would report the fake accident to the police (Tr. 91–94).

Guance said that he was called by Vega to meet Vallejo in his office on September 7. While in the office, Vallejo asked what had happened the previous evening. Guance replied that another truck had crashed into their truck. Guance testified that he knew his statement to Vallejo was false, but said that Germosen told him that if he didn't say what was in the fake accident report, Guance could have problems with the company. Guance testified that "I couldn't contradict the report with the report that they gave me." Guance then went back to work, but was recalled by Vega 15 minutes later to Vallejo's office. When Guance arrived, he was shown a document to sign and was told he was being fired. Guance then left the office and went home (Tr. 94–97, 126).

Guance denied knowing English and could not read the discharge notice, but knew he was being discharged for lying. The notice stated that "Helper (Guance) lie about an accident" (GC Exh. 7). Guance knew what he told Vallejo was false and gave a "fake report" over the accident in their initial meeting. He admitted being informed that he was fired because he faked the circumstances over the accident and then admitted that he lie at the first meeting (107–110).

Vallejo testified that Vega called him at night on the day of the accident. On the following morning, Vallejo arrived at work to inspect the damage to the truck. Vallejo said that he first spoke to Guance about the accident. According to Vallejo, Guance told him that the truck was hit by another truck causing the accident. Vallejo testified he did not believe Guance's story because the damage to the truck was inconsistent with a head on collision with another truck. Vallejo said that there would have been more extensive damage to the truck's upper area and not just damage to the bottom of the bumper and the front corner of the truck. Vallejo said that he was aware that the truck was doing a pickup at a client's facility and the damage to the pillar at the entrance of the client's facility was consistent with the damage to his truck (Tr. 456–-462; R. Exh. 5 and 6).

Vallejo said that he spoke to Germosen about 10 minutes later, after Guance left his office. Vallejo asked him what had happened and Germosen said he struck the pillar at the client's facility. Vallejo said he suspended Germosen for the accident. Vallejo said that he called back Guance to the office and informed him that he was being discharged for lying about

the truck accident. According to Vallejo, Guance was given a ". . . chance to come clean" over the accident, but Guance insisted that another truck had hit the truck. Vallejo said that Guance was discharged at that point. Vallejo said that Guance was discharged and Germosen was suspended because Germosen told the truth and Guance continued to lie after given a chance to tell the truth (Tr. 464, 465).

Vallejo said that Guance signed the discharge notice (GC Exh. 7) and that he translated the document in Spanish to him (Tr. 465, 466).

Vega testified that he received a telephone call from Germosen and Guance regarding the truck accident. Vega recalled that Germosen called him first. Vega said they called him because they could not reach Vallejo. Vega was informed by Germosen that their truck was stopped at a traffic light and another truck turned the corner and hit their truck. Germosen said they tried to stop the other truck but it was a "hit and run" accident.

Vega told Germosen to file a police report over the accident. Vega called Germosen back to find out the status of the police report, but there was no answer. At this point, Vega called Guance and was informed by Guance that Germosen was completing the report. Vega told Guance to call him back when they were driving back to the warehouse. Shortly, Guance called and Vega asked Guance what had happened. Guance told Vega about waiting at a traffic light and being hit by a turning truck and that it was a "hit and run" accident (Tr. 516–518).

Vega said that on the following morning, he inspected the truck for damages. Vega said that Vallejo had already inspected the damage and they both agreed that the accident was not caused by another vehicle. Vega said he noticed a long yellow line coming down the bumper which was consistent with hitting a yellow pillar. After Vega and Vallejo spoke, Vega said that they met with Guance and was asked what happened to the truck. Guance insisted that it was a "hit and run" accident with another truck (Tr. 518–520).

Vega testified that he and Vallejo then spoke to Germosen about the accident. Germosen admitted to hitting a pillar that caused the damage to the truck. Vega said that Guance was then called back. Vega testified he was 'in and out" of the office for this meeting, but did recall telling Guance that accident happens and why did he have to lie? According to Vega, Guance replied that it was the "street code" not to snitch or tell on someone. Vega did not recall if he was present in the office when Guance was terminated after he spoke to him (Tr. 520–522).

The Alleged Threats, Surveillance and Interrogation Of Jose Luis Ubraez

Jose Luis Ubraez (Ubraez) was employed as mechanic responsible for troubleshooting and repairing the trucks and vehicles operated by the Respondent. Ubraez was employed by the Respondent from June 2015 until his discharge on about October 14, 2016. Ubraez was the only mechanic employed by the Respondent and worked one shift from 6 a.m. to 6 p.m. until his work was done for the day, which included frequent overtime hours because of his responsibility to ensure all trucks in the warehouses and at the Respondent's Bayshore facility were in safe and operating conditions. Ubraez testified he was responsible for 8-10 trucks at the Bronx facilities and would inspect each truck in the morning before they went out. Ubraez would report to

Vallejo of any problems with the trucks and the repair work that was needed. Ubraez works out of 1120 Grinnell Place (Tr. 171-–179; GC Exh. 13).[18]

Ubraez testified that he was taking a lunch break about 12 noon and was called over by a coworker and informed that there were union representatives in front of 1120 Grinnell Place and whether Ubraez would like to speak to them. Ubraez recalled that this occurred in June. Ubraez went to visit the union representatives and they discussed the benefits of having a union shop. Ubraez said he was handed a union card application which he placed in his pocket to fill out later in his office. Ubraez said that he completed the card in his office and returned the card to one of the union representative, whom he identified as "Fernando" (Tr. 180–183; GC Exh. 14: Ubraez' signed union card, dated June 6, 2016).

Ubraez said that he again met with the union representatives in July, but does not recall the date. Ubraez was asked by Fernando if he had signed the union card. Ubraez replied in the affirmative. Ubraez then proceeded to Vallejo's office after speaking with Fernando. He said that Vallejo and Vega were present in the office.[19] Ubraez informed Vallejo that he had ". . . filled out the card to belong to the union…and if that could cause me any problems." According to Ubraez, Vallejo responded, "That would depend on the point of view of the company." Nothing else was said and Ubraez was told by Vallejo to return to work (Tr. 185–188).

On cross-examination, Ubraez explained that he decided to tell Vallejo that he had signed the union card because Ubraez had heard that workers who had signed cards were under surveillance by the Respondent (Tr. 224). Ubraez did not testify that he was under surveillance when he was given a union card and when he returned the card to Fernando in June or when he met Fernando a second time in July.[20]

Ubraez testified that he observed the presence of the union representatives several more times in July. He did not speak to them and he did not observe any managers talking with them (Tr. 188). In subsequent testimony, Ubraez did recall observing Da Silva talking and pointing to the union representatives from across the street. Ubraez testified that he knows Da Silva as a supervisor because his daily job was to direct trucks unloading the recycles and carried a folder to count the quantity of recycled bags being unloaded (Tr. 191).

Ubraez said that he was standing in front of 1111 and observed the parties talking in front of 1120 Grinnell Place. Ubraez said that he did not understood what was being said because the parties were talking in English. Ubraez said that Da Silva subsequently approached him and two other workers while they were working inside 1111 Grinnell Place. It is unclear from his testimony if Da Silva approached Ubraez on the same day that Da Silva spoke to the union representatives or after that day. In any event, it is alleged that Da Silva told the three workers that ". . . we were going to be dumbasses because we had to pay the union to represent us. That

[18] Ubraez testified in Spanish with a language interpreter.

[19] Ubraez did not know David's surname, but the individual has been identified as David Vega and the parties had stipulated, above, that Vega is the assistant to Vallejo and an agent of the Respondent.

[20] The counsel for the General Counsel never argued that Ubraez was under surveillance; only that Guance was allegedly under surveillance (GC Br. at 29–31).

could also provoke the lowering-- the diminishing of our salary." Ubraez said that no one responded to the comment (Tr. 193, 194). The counsel for the General Counsel argues that this statement allegedly made by Da Silva threatened workers with loss of wages because of their activities in support of the Union (GC Br. at 40).

Ubraez testified to another encounter with one of Respondent's supervisors in July.[21] Ubraez said that was approached by Wellington Mercado and asked about the status of a truck that Ubraez was repairing. Ubraez said it would take more time for the repairs. Ubraez said that a coworker, named "Joel" was present during this conversation. Suddenly, the conversation turned and Mercado asked Ubraez and Joel whether the Union was going to bring food for them to eat. Joel responded that he had no interest as to whether the Union was bringing food or not to the workers. According to Ubraez, Mercado then said that "one by one that had signed the card with the union, we're going to be out of the company . . ." Ubraez replied that Mercado did not have the right to say that and Joel replied that he (Mercado) had to be the owner of the company to say that. Nothing was said after the last comment made by Joel (Tr. 194–197).

Ubraez recalled a third encounter with another Respondent official. Ubraez testified that Vega asked about the progress of his work on an unspecified date in July. Vega allegedly told Ubraez that the job should only take one day and not 2 or 3 weeks and that (Ubraez) was not going to be long with the company because he had been working on the same repair for 3 days when it should only take 1 day to do the job. In the same conversation, Vega then asked Ubraez if he had signed the union card and Ubraez replied in the affirmative (Tr. 197-199).

Ubraez testified to another encounter with Vallejo in July. Ubraez said he was working in the yard and was approached by Vallejo and asked how long it would take him to repair the trailer of a truck. Ubraez replied that it would take some time because he was working alone. It is alleged that Vallejo ". . . told me you filled out the card of the union." Ubraez replied why Vallejo kept asking him about the union. It is alleged that Vallejo responded that could be reason to be thrown out of the Company. Ubraez asked Vallejo why he continued to talk in that manner. There were no other comments and Vallejo then left (Tr. 200–202). On cross-examination, Ubraez testified that Vallejo did not ask if he had signed the union card, but was told by Vallejo that he did (Tr. 286).

There was yet another encounter with Vallejo. Ubraez testified that he was working on a vehicle when he was using gas and oxygen equipment and his clothes caught on fire. Ubraez said that he was able to put out the fire and reported the incident to Vallejo. Vallejo asked what had happened and Ubraez explained his clothes caught on fire and that it required more than one person to do the work. Ubraez said that Vallejo just laughed at him. Ubraez said "don't laugh" because he had burned himself. Vallejo then said that Ubraez had filled out a card for the Union and that could be the reason for being fired from the company. Ubraez replied that he had spoken to Vallejo about his union support and was told that was not a problem, which, Vallejo then said, "that depends of (sic) the point of view of the company will take that (Tr. 202–205). Ubraez said this incident occurred 6 months prior to his discharge (Tr. 262).

[21] On cross-examination, Ubraez was corrected that the incident with Mercado actually occurred in August and not July (Tr. 282, 283).

The counsel for the General Counsel alleges that the statements made by Mercado, Vega and Vallejo threatened workers with discharge for their support of the Union (GC Br. at 24–26).

Vallejo denied that Ubraez came up to his office about signing a union card. Vallejo denied knowing if Ubraez supported the Union. Vallejo also denied telling Ubraez that he could be discharged for supporting the Union. Vallejo stated that at no time did he know if Ubraez supported the Union prior to his termination (Tr. 486-488).

Vega denied that Ubraez was in Vallejo's office to talk about his union card. Vega stated that Ubraez never spoke about the Union to him. Vega also denied telling Ubraez that he won't last long working in the company for signing a union card (Tr. 529).

The Discharge of Ubraez

Ubraez was discharged on October 17, 2016. Ubraez testified that he was summoned by Vega to Vallejo's office at the end of his work day on October 14 at approximately 6:45 p.m. Ubraez said that Supervisor Sammy Lopez was present and another individual that he knew as Rogich.[22] Ubraez said that Vallejo spoke in English and Lopez translated. Ubraez was informed that he was being fired and instructed to sign a document that was written in English, which Ubraez refused to sign. Ubraez said that Lopez translated the document to Spanish for him and told Ubraez that he was being fired for not doing his job and that he lacked respect for his coworkers when he was given job assignments. Ubraez was shown the document that he refused to sign, but did take a picture of the discharge notice with his cell phone (Tr. 206–211). The discharge notice, dated October 14 (GC Exh. 15 and 5), stated:

> Lack of job performance. Negative attitude when told to perform job assignments. Being disrespectful to co-workers.

As he was told to leave, Ubraez left the premises with Rogich and Lopez. Ubraez said that Rogich went outside with Ubraez where Ubraez met his friend. According to Ubraez, Rogich was conversing with Ubraez' friend in English and Ubraez was informed by his friend that Rogich did not understand why Vallejo fired him because Ubraez was doing a good job. It is also alleged that Rogich had authorized three wage increases for Ubraez and Vallejo was not in agreement with the raises. Additionally, Rogich told Ubraez' friend that Ubraez had refused to work at a location in Massachusetts. Ubraez did not respond to any of Rogich's comments (Tr. 212–215).

Ubraez testified that the Massachusetts assignment was never raised at his discharge meeting and denied he was told that his work was poor or that he had refused to perform a job assignment. Ubraez also denied receiving any formal performance evaluations or that any supervisor counseled him on being disrespectful to coworkers. Ubraez maintained that Martucci would tell Ubraez that he was doing a good job ("Good, Mucho Bueno") and Rogich had mentioned in a 2016 Christmas party that he was "doing a good job." Ubraez admitted, however, he was initially suspended for 3 days in 2016 for refusing a job assignment to obtain some auto parts. Ubraez said that the auto parts did not match the VIN number on the truck and

[22] Richard Rogich is the general manager and Sammy Lopez is the facility manager.

refused to accept the responsibility. Ubraez said that he was suspended for another week when he returned from his 3 day suspension. Ubraez repined that he was never served the suspension notice, dated March 4, 2016, and denied that the signature on the notice was his (Tr. 215–218, 225–227, 248, 249; GC Exh. 16).

Vallejo testified Ubraez did a mediocre job as a mechanic. He said that Ubraez would take a long time in repairing the trucks and felt that Ubraez was "just killing time" when a 10-minute job took him over 3 hours to complete (Tr. 474–477).

Vallejo stated that Ubraez has been counseled before about his performance by Vega and Ubraez was previously suspended for 10 days (March 3–14) for failing to follow direct orders to obtain auto parts for a truck. Vallejo said he asked Ubraez two or three times to obtain the parts, but he refused. Vallejo insisted that the suspension notice was translated for Ubraez and that he signed the suspension notice (Tr. 477–479; GC Exh.16).

Vallejo testified to another example of Ubraez' poor job performance. Vallejo said that on October 4, he was instructed to repair the headlights of one of the trucks. Truck driver Gustavo Moya reported that the light was damaged in the morning before the trucks went on their routes. Vallejo stated that the trucks are usually out by 7:30 a.m. and that Ubraez had not finished the job until 10:30 a.m. Vallejo said that the repair job should have taken 10 minutes for Ubraez to complete. Vallejo said that Ubraez never reported to him that he could not do the repairs or that the job would actually take 3–4 hours to complete (Tr. 479–485).

In rebuttal, Ubraez testified that he had fixed the truck in less than ten minutes. However, Ubraez recalled the incident occurring in July and not October. Ubraez said he remembered the month because the incident occurred during the time the union representatives were present at the facility in July (Tr. 561–564).

Gustavo Moya (Moya) testified as a witness on behalf of the Respondent. Moya said that he is a driver at the Bronx facility and knows Ubraez as the mechanic that repairs his truck. Moya testified that Ubraez would always take his time to inspect his truck and would be slow in making any necessary repairs. Moya complained that the delays by Ubraez in repairing his truck caused him time in leaving the warehouse on time. Moya recalled a specific incident in October 2016 when Ubraez was taking too long in repairing a headlight. Moya reported to Vega that he couldn't take the truck out because of the repairs. Moya said that Vega instructed Ubraez to work faster on the repairs, but Moya was unable to leave until 10:30 a.m. (Tr. 425–428).

Vega testified that he had a confrontation with Ubraez in winter 2016 when Ubraez threatened him with a large wrench after Vega removed the workers that were permitted by Ubraez to lounge around his office and not work. According to Vega, Ubraez threatened him with the wrench for snitching on him.[23] Vega knew of Ubraez' suspension in March. Vega said that he had personal knowledge that Ubraez was suspended for refusing an order to obtain parts for a truck. Finally, Vega testified that he recalled the Moya incident and the truck did not leave the premises for more than two hours. Vega said that Ubraez was supposed to fix a light on the truck (Tr. 523–529).

[23] In rebuttal testimony, Ubraez denied that he had threatened Vega with a wrench.

Vallejo testified that Ubraez was terminated due to his poor job performance. Vallejo denied that Ubraez reported that his clothes had caught fire a week prior to his discharge. Vallejo said that Ubraez never reported the incident or that he took time off from work due to any injuries.

Vallejo said that Ubraez' performance on the job was so poor that he began looking for his replacement in March after Ubraez was suspended for ten days.[24] Vallejo said that he was considering another mechanic named Alejandro Lopez to replace Ubraez and Lopez started as the replacement mechanic shortly after Ubraez' termination (Tr. 485–497).

Discussion and Analysis

The consolidated and amended complaint alleges and the counsel for the General Counsel argues that the Respondent violated Section 8(a)(1) of the Act by engaging in the surveillance of the workers' union activities; by threatening employees with the loss of wages and hours because of their support for the Union;[25] by threatening employees with unspecific reprisals because they supported the Union; and by interrogating employees about their support for the Union. It is also argued that Ubraez and Guance were discharged in violation of Section 8(a)(3) and (1) of the Act because of their support for and their activities on behalf of the Union. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it instructed employees at the Bayshore facility to sign a petition revoking their support for the Union.[26]

Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." See *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009).

[24] The counsel for the General Counsel objected to this line of questioning. I allowed this examination because it shows that the Respondent was sufficiently concerned over Ubraez's job performance that it started to search for a replacement mechanic. The timing of the job search for a new mechanic is highly relevant since the intent to replace Ubraez occurred prior to the union organizing efforts.

[25] The word "hours" were deleted by the counsel for the General Counsel at the hearing (Tr. 387).

[26] To be clear, the counsel for the General Counsel had also argued in her opening statement that "This is a classic nip in the bud case" (Tr. 18). Nip-in-the-bud cases involve an employer unlawfully discharging an employee in as "preemptive strike" to halt anticipated concerted activities by that employee before they come to fruition. *Parexel International*, 356 NLRB 516 (2011). *Parexel* made clear that it assumed for the purposes of deciding that case that the employee had not yet engaged in protected concerted activity. See *Matrix Equities, Inc.*, 365 NLRB No. 69 fn. 7 (2017). That argument was quickly dropped since the counsel for the General Counsel maintained that Guance and Ubraez had engaged in protected activity prior to their discharge.

The test for evaluating if the employer violated Section 8(a)(1) is "whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities." *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . . and such a determination appropriately takes account of the surrounding circumstances." *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

Credibility Determinations

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

4. The Respondent did not Violate Section 8(a)(1) of the Act by Engaging in the Surveillance of Employees' Union Activities

Paragraph 11 of the consolidated and amended complaint alleges that supervisors Sammy Lopez and Ed Martindale on or about July 18; Wellington Mercado from July to September; and David Vega in or about August, engaged in surveillance by standing by or videotaping employees engaged in union activities.

In determining whether observation of open union activity is coercive under Section 7 of the Act, the Board considers several factors, including the duration of the observation, the employer's distance from its employees while under observation and whether the employer engaged in other coercive behavior during the observation. *Aladdin Gaming, LLC.*, 345 NLRB 585, 586 (2005). Under Board precedent, "management officials may observe public union activity, particularly without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); see also *Durham School Services*, 361 NLRB 407, 407 (2014) (observation of union activities in a public area was unlawful surveillance when manager "was observing employees in way that was out of the ordinary"). Such "out of the ordinary" surveillance of union activity in public places includes an employer's "unreasonably close" observation of organizers as they finish their lunches. *Montgomery Ward & Co.,* 692 F.2d 1115, 1128 (7th Cir.1982), enfd. 256 NLRB 800 (1981).

The counsel for the General Counsel acknowledges that "mere observation" of open, public union activity is not unlawful surveillance but argues that Respondent "crossed the line" of mere observation (GC Br. at 27). I disagree. Whether there was surveillance is based upon a review of the totality of the circumstances and considering a number of relevant factors. In looking at the totality of the circumstances and applying the factors in *Brown Transport Corp.*,

294 NLRB 969 (1989), I find that the frequency, duration of time, and a legitimate business reason for the supervisors to be present in the public areas during working hours showed there was no surveillance by the supervisors of employees engaged in union activities.

Lubrano testified to certain anti-union statements made by an individual who identified himself as "Fuck you Danny" and by Supervisor Sammy Lopez in June. To be clear, there are no allegations in the complaint regarding surveillance of employees during the month of June. To that extent, such testimony given by Lubrano regarding his observations of the supervisors or agents of the Respondent during the month of June only serves as background information.

Lubrano testified that he provided information about the Union and distributed union card applications to the workers in June. Lubrano testified that Danny told them to leave because the employees were busy working and to return either before 7 a.m. or after 2 p.m., which Lubrano and another union representative named Clemenza, complied. Lubrano recalled nothing else of his encounter with Danny.

Lubrano and Clemenza returned the next day, along with another union organizer named Aviles to hand out more union cards. The organizers did not speak to the workers. On this second occasion, the union representatives encountered Supervisor Sammy Lopez and "Fuck you, Danny." Lopez allegedly told them that he was "pro-union" and Danny reminded them to leave by the start of the 7 a.m. work shift. Lubrano recalled that nothing else was said. Lubrano testified that he and other representatives visited the Respondent's facilities on other occasions in June. Lubrano did not state how many times the union representatives returned to the Bronx warehouses in June and did not recall speaking to the workers. Lubrano said they had tried to speak to the workers but did not say why the union representatives were prevented from speaking with the workers. Lubrano testified that "Danny" grew more hostile and did not want them there. However, Lubrano did not recall how Danny was hostile to the union representatives or what was said that caused him to believe that Danny was hostile to the Union. Clemenza and Aviles did not testify to corroborate Lubrano's testimony that "Danny" was hostile to the union representatives. More importantly, no antiunion statements were attributed to supervisor Lopez. Lubrano merely stated that Lopez told him that he was "pro-union." This is certainly not indicative of union animus even if the comment made by Lopez was factual. More significantly, there was no testimony provided by Lubrano that supervisors or agents of the Respondent were engaged in surveillance of the employees when Lubrano and other union representatives were distributing and collecting union cards in the public area in June.

The counsel for the General Counsel alleges specifics date in July when Respondent engaged in surveillance of the workers with the union representatives. Lubrano testified that he was at the Bronx warehouses with Clemenza, Aviles, and Giavinco on July 18. Lubrano testified that he observed Lopez and Da Silva watching from 5-10 feet away while they were speaking to the workers. Da Silva was photographed looking at a worker completing a union card. Lubrano said that neither Lopez nor Da Silva spoke to the union representatives. A second photograph was taken of Da Silva with two fingers raised in both hands which look like peace signs toward Lubrano. Lubrano did not recall if anyone else was with him or around him when he took the picture. Lubrano did not exchange any words with Da Silva when the picture was taken. Lubrano also testified that another Supervisor Martindale had requested a union poster that was

on a telephone pole. When Lubrano refused, it is alleged that Martindale took the poster down and carried it away over Lubrano's protest.

I find that the Respondent was not engaged in surveillance of the workers and union representatives on July 18. Lubrano said that Lopez and Da Silva were seen observing the union representatives talking with the workers in a public area.[27] The supervisor or agent did not interfere with the workers and the union representatives. Lopez did not speak to the union representatives and Lubrano testified that none of the union people spoke to Lopez or Da Silva. With respect to Da Silva, I find that he was merely observing a worker completing ostensibly a union card. Lubrano testified that no one spoke when he took the picture. There has been no testimony that Da Silva interfered in the completion of the card by the worker. There has been no testimony that Da Silva was observing for more than mere minutes. The second photograph of Da Silva with his hands up is subject to numerous interpretations. Da Silva could have been merely posing for Lubrano's picture taking. Lubrano testified that he did not observe anyone near him or Da Silva when the picture was taken. Despite the photograph being subjected to interpretation as to what Da Silva was doing, it is perfectly clear that he was not engaged in surveillance because there was simply no one around when Lubrano snapped his photograph of Da Silva. Finally, the taking down of the Union poster by Martindale, without more, may have been ill mannered but certainly not demonstrative of antiunion animus. This incident occurred once and only with one poster. It has not been alleged that Martindale continue to take down other union posters or made any inflammatory antiunion remarks to Lubrano when he grabbed the poster.

The counsel for the General Counsel argues that the workers were also under surveillance by the Respondent on July 19. Lubrano testified that he went back to the Bronx warehouses on July 19 with Giavinco, Aviles, and Vogt. Lubrano took a picture at 6:10 a.m. of the union setting up a table to distribute food to the workers showing Aviles with his hands on his hips, and looking over the shoulder of an unidentified worker next to the bay doors at 1120 Grinnell Place (GC Exh. 21). There are no supervisors in the picture. At 6:22 a.m., Lubrano took a photograph of Vega taking a video of the union representatives. Lubrano testified that Vega was with Lopez, "Danny" and Da Silva in front of the bay doors at 1120 Grinnell Place (red brick building) and he was 5-10 feet away from Vega. Lubrano then crossed the street opposite to1120 and took a few pictures of Vega and the other supervisors (GC Exh. 9 and 20). The pictures show Vogt and Giavinco with Vega and Da Silva.

Lubrano represented that when Vega was taking his video of Lubrano in General Counsel's Exhibit 20, Vega was also taking a video of the individuals at the union table shown in General Counsel's Exhibit 21. Lubrano testified that he believed Giavinco, Vogt and/or Aviles may have told Vega not to take pictures or videos of the employees speaking to the union representatives. I do not find Lubrano credible on this point. On cross-examination, Lubrano admitted that he was not certain if Vega was actually taking a video or picture of him. He also admitted that there were no employees in the picture and no one else was around him when he

[27] I find that Da Silva was an agent of the Respondent under Sec. 2(13) of the Act. Da Silva was a salaried employee and credible testimony showed that he was observed directing the loading and unloading of recycled materials and was considered by the Respondent as non-bargaining employees who should not vote in the union election (GC Exh. 24).

took the picture. More significantly, since Lubrano walked across the street to take his picture of Vega, he could have also taken a photograph of Vega allegedly videotaping the union representatives and the worker as shown in General Counsel's Exhibit 21. In other words, Lubrano could have taken one picture of Vega allegedly filming the union lunch table instead of taking two separate pictures. As such, given the fact that the two pictures were taken at different time makes me question the validity of Lubrano's testimony that Vega was filming the union representatives when they were talking to a worker at the union table. Finally, Lubrano admitted that there were no workers at the bay doors or near him when Vega was allegedly filming him. I would also note that Vogt said there were no workers present when Vega was taking the picture. Vogt said he and Giavinco were having a cordial conversation with Vega and another supervisor. Contrary to Lubrano's testimony, Vogt never testified that he told Vega to stop videotaping the worker at the union table or at Lubrano.

There is also no reason to dispute Vega's testimony that he was only videotaping Lubrano over his concern that the union representatives were attempting to stop a truck that was pulling into the warehouse. Vega admitted videoing the interaction because of safety concerns in the event that Lubrano or the others were injured if the truck failed to stop. I credit Vega's testimony on this point in light of the fact the both Lubrano and Vogt testified that no workers were present when Vega was videotaping.

The third incident of alleged surveillance occurred on July 25. Lubrano, Clemenza, Aviles, and Vogt arrived at the Bronx facilities at approximately 8 p.m. Lubrano said he noticed Wellington Mercado taking photographs or videos of the employees speaking with the union representatives. Lubrano was standing on the sidewalk and Mercado was in the street as the other union representatives were talking with the workers. Lubrano believed Mercado was taking photographs because he noticed the flash on the cell phone when a picture was taken. Lubrano decided to take his own picture of Mercado while Mercado was photographing the workers and union representatives (GC Exh. 10). Lubrano was 10–15 feet away when he took the picture of Mercado and observed Mercado using his cell phone to take pictures/videos for about 3–5 minutes. Lubrano said he was standing in front of the union table when he took a picture of Mercado and believed the other union representatives may have been behind him at the table. Lubrano could not recall if any workers were standing near him when Mercado took his picture.

Vogt tried to make cordial conversations with Mercado but testified that Mercado was busy directing the workflow and traffic with the Respondent's trucks on the street. Vogt admitted that he was aware that supervisors were required to cross the street to work in both buildings and was aware that Mercado was directing and moving trucks on July 25. Vogt also testified that he observed a dark vehicle driving up and down Grinnell Place with the back window slightly opened and seeing camera flashes coming from the window.

Vallejo testified that he was aware that the Union was present in front of the two warehouses in July and that the Union had set up a table where the workers may have their lunches outside of 1120 Grinnell Place. Vallejo denied taking any pictures of employees speaking with the Union. Vallejo also denied that any workers were disciplined or threatened with discipline for speaking with the Union.

Vallejo said he was not present on the evening that Mercado was videotaping but described that Grinnell Place is a two-way street and believed that Mercado was taking a picture of parked vehicles as verification that they were blocking the ingress and egress of the trucks.

I find that the Respondent did not engage in surveillance on July 25. Again, Lubrano could not recall if there were any workers around when Mercado was taking his video. Vogt testified that he was having a "cordial conversation" with Mercado during the taping. I find that Vallejo's testimony is more credible that Mercado was taking pictures of the parked cars that were blocking the bay doors especially in light of the fact that Vogt was aware that supervisors needed to work in both warehouses and that Mercado was directing the and moving the trucks on July 25.

I find that the Respondent did not engage in surveillance of the workers and union representatives based upon the totality of the circumstances. None of the supervisors approached any union representatives to impede the distribution of union leaflets or membership applications. The supervisors did not wave off the workers, did not call out the names of any employees as the union representatives attempted to hand out union literature. Passing employees were never discouraged from talking or accepting union literature. Merely monitoring union handbilling has been found not to be "out of the ordinary" activity that is unlawful surveillance. See *Brown Transport Corp*., supra at 971. In *Wal-Mart Stores*, *Inc.,* 340 NLRB 1216, 1217 (2003), the Board found that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in a public area, unaccompanied by any coercive behavior, did not constitute unlawful surveillance. There is simply nothing in the record to believe or to give the impression that workers were under surveillance.[28] As such, there is no reasonable belief on the part of the employees that they were under surveillance to give the presence of supervisors a coercive effect.[29] Further, without more, the observation by

[28] Contrast the situation in *Arrow Automotive Industries*, above, where managers stood next to the exit gates to its facility and observed the union representatives, and yelled at employees such things as "don't take that garbage," "bring that card to me" and "don't sign anything, you can end up in court." Such conduct was found to constitute unlawful surveillance. 258 NLRB at 863. Similarly, in *Gupta Permond Corp.*, 289 NLRB 1234, 1234 fn. 2 (1988), the Board affirmed the administrative law judge's finding that the respondent had unlawfully created the impression of surveillance as follows: "we emphasize the judge's finding that the Respondent was simultaneously and unlawfully interfering with the distribution of union literature on public property. Thus the Respondent's conduct went beyond . . .'mere observation' " (citing *Hoschton Garment Co*., 279 NLRB 565 (1986)). See also *Gainsville Mfg. Co*., 271 NLRB 1186 (1984) where the Board found that the respondent had engaged in unlawful surveillance when its plant manager attempted to prohibit the distribution of union materials on public property, demanded that the union representative leave and stood in close proximity to a union representative for the duration of the handbilling.

[29] Indeed, the only worker who testified to any surveillance was Guance. His testimony will be addressed in the portion of this decision dealing with his discharge. Aside from his testimony, Ubraez never testified to surveillance by the Respondent and the counsel for the General Counsel never presented any other workers as witnesses to testify that they felt "interfered with, restrained, or coerced" in the exercise of their Sec. 7 rights when speaking with the union representatives.

Vogt of a vehicle driving up and down the street may be unusual, but calls for speculation as to what a passenger in the car was doing.

Even an employer's close, as opposed to casual, observation of union activity at or near his premises cannot be found to constitute unlawful surveillance of that activity, especially in light of the fact that the supervisors are legitimately engaged in work-related activities on the public street in directing and moving the trucks. I find under the circumstances here of three isolated and brief events; similar conduct did not occur at the Bronx location after July 25; and the supervisors did not engage in any coercive activity while observing on the three occasions, does not violate Section 8(a)(1) of the Act. *Wal-Mart Stores*, *Inc.,* id.

Upon my review and consideration, I recommend the dismissal of all the allegations in paragraph 11 of the consolidated and amended complaint.[30]

5. The Respondent did not Violate Section 8(a)(1) of the Act by Threatening Employees with Discharge Because of Their Activities on Behalf and in Support for Union

Paragraph 8 of the consolidated and amended complaint alleges that employees were threatened with discharge for their activities in support of the Union in violation of Section 8(a)(1) of the Act. The counsel for the General Counsel alleges that agent Vega and supervisors/managers Mercado and Vallejo threatened Urbaez with discharge because of his activities allegedly on behalf and in support of the Union.[31]

Ubraez testified that he was on his lunch break in June when a coworker called him over and asked if he wanted to speak to some union representatives. Ubraez did and he was informed of the benefits of having a union shop by a union representative named Fernando. Ubraez was given several union card applications which he placed in his pocket. Ubraez said that he completed the card in his office and returned the completed one to Fernando. His union card was dated June 6, 2016. Ubraez had engaged in no other activities supporting or on behalf of the Union other than briefly speaking to a union representative and completing his union card in June.

Ubraez said that he again met with the union representatives in July, but does not recall the date. Ubraez recalled meeting Union Representative Fernando again. According to Ubraez, Fernando asked him if he had filled out the card for the Union and he replied in the affirmative (Tr. 185). I do not credit the testimony of Ubraez on this point. Ubraez testified he completed and handed his union card to Fernando on June 6. I find that Ubraez' meeting with Fernando in July was pure fabrication. It is simply not credible that Fernando would ask Ubraez if he had

[30] The complaint alleges that Mercado engaged in surveillance of the workers and union representatives on other dates in July and through September 2016. Except for the July 25 alleged incident, the counsel for the General Counsel proffered no evidence of any other incidents of surveillance engaged by Mercado. As such, that allegation is also dismissed.

[31] To be clear, Urbaez was the only worker who had testified to the alleged threats to discharge employees because of their activities in support of the Union.

signed the union card in July since Fernando was the same union representative who had handed Ubraez a union card, which Ubraez then completed and gave it back to Fernando on June 6.

It also strains credibility that on the same day in July, Ubraez then went to Vallejo's office on his own volition to tell Vallejo he had completed a union card and whether filling "…out the card to belong to the union…" would cause him any problems. According to Ubraez, Vallejo responded "That would depend on the point of view of the company." Nothing else was said.

Vallejo denied that Ubraez came up to his office about signing a union card. Vallejo denied knowing if Ubraez supported the Union. Vallejo also denied telling Ubraez that he could be discharged for supporting the Union. Vallejo stated that at no time did he know whether or not Ubraez supported the Union prior to his termination. Vega stated that Ubraez never spoke about the Union to him. Vega also denied telling Ubraez that he won't last long working in the company for signing a union card.

The counsel for the General Counsel argues that Ubraez was credible because he provided detailed testimony whereas Vallejo and Vega only provided general denials. However, as I find here, a general denial is totally acceptable when an event or incident did not actually occur.

It simply makes no sense that Ubraez would approach Vallejo and in the presence of Vega, informed them he had signed a union card. Other workers, including Guance, had signed union cards and did not testify that they were threatened with discharge about signing union cards. Only Ubraez testified to this allegation. Indeed, assuming that the conversation occurred in Vallejo's office, Ubraez never testified that he was threatened with discharge for signing a union card, only asked whether it may cause him some problems and Vallejo's response was "it depends." Vallejo's alleged response is, at best, vague and certainly not a threat to discharge Ubraez. In addition, Ubraez testified that Vallejo prefixed his "it depends" response by commenting that there was no problem:

> Ubraez: When I said that, that I had filled it (union card) out, and if there was a problem. He (Vallejo) said *there's no problem*. That would depend on the point of the view of the company (Tr. 188).

The counsel for the General Counsel alleges that in a second incident in July after the office event, Vallejo approached Ubraez about a work assignment and asked Ubraez if he had signed a union card (Tr. 206). It is alleged that Vallejo responded that could be reason to be thrown out of the Company. Again, I do not credit the testimony of Ubraez. There is simply no discernible reason for Vallejo to ask Ubraez whether or not he had signed a union card when Ubraez testified that he told Vallejo in his office that he had already signed the card. Further, Ubraez insisted that Vallejo did not ask if he had signed a union card, but testified that Vallejo told him that he had signed the card (Tr. 286). If Vallejo already knew that Ubraez had signed a union card, it makes no sense that Vallejo would subsequently tell Ubraez that he is aware that Ubraez had signed the card.

Ubraez also recalled an encounter with Vega in July. Ubraez testified that Vega asked about the progress of his work. Vega allegedly told Ubraez that the job should only take one day and not 2 or 3 weeks and that (Ubraez) was not going to be long with the company because he had been working on the same repair for 3 days when it should only take 1 day. In the same conversation, Vega allegedly asked Ubraez if he had signed the union card and Ubraez replied to him in the affirmative. Again, it would not be credible that Vega would ask Ubraez whether he had signed a union card if one accepts Ubraez' testimony that he had already volunteered to tell Vega and Vallejo in the office that he had signed the card.

Ubraez testified to yet encounter with one of Respondent's supervisors in August. Ubraez said that was approached by Mercado and asked about a repair job. Ubraez said that a coworker, named "Joel" was present during this conversation. Suddenly, the conversation turned and Mercado asked Ubraez and Joel whether the Union was going to bring food for them to eat. According to Ubraez, Mercado then said that "one by one that had signed the card with the union, we're going to be out of the company . . ." Nothing else was said between the parties. The coworker, "Joel," was not called by the counsel of the General Counsel to corroborate this conversation with Mercado. The corroboration of this conversation with another coworker would have substantiated Ubraez' credibility; yet, the coworker was not summoned to appear and give testimony.

Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling them. *Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn. 6 (1996), affd. on point 123 F.3d 899, 907 (6th Cir. 1997). However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. *C & S Distributors*, 321 NLRB 404 n. 2 (1996), citing *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Stabilus, Inc*., 355 NLRB 836, 840 fn. 19 (2010).

There was yet another encounter with Vallejo. Ubraez testified that he was working on a vehicle when his clothes caught on fire. Ubraez said that he was able to put out the fire and reported the incident to Vallejo. Vallejo asked what had happened and Ubraez explained about his clothes being caught on fire. Ubraez said that Vallejo just laughed at him. Ubraez said "don't laugh" because he had burned himself. Vallejo then said that Ubraez had filled out a card for the Union and that could be the reason for being fired from the Company.

Ubraez' fabrication of this incident is clear. Ubraez said this incident occurred six months prior to his discharge (Tr. 262). Ubraez was discharged in October. According to Ubraez, the alleged fire incident would have occurred in May. The Union did not begin organizing until early to mid-June. As such, Vallejo would not have asked about Ubraez' union card in May. Further, there are no records to corroborate that a safety incident report was filed and Ubraez never requested any medical treatment although he testified that his clothes caught on fire and he was burned. No one else testified to seeing a fire or reported that a fire occurred.

It is my firm belief that all the incidents about the threats to discharge were fabricated by Ubraez because he knew that the Respondent was unsatisfied with his work. There is no corroborating evidence or witnesses to any of these events. None of the union representatives

testified at the hearing that they had observed Respondent engaged in surveillance of Ubraez talking with and handing over his union card to Fernando.

I would recommend dismissal of this allegation in the complaint.

6. The Respondent did not violate Section 8(a)(1) of the Act by Interrogating Employees about Their Union Activities on Behalf of and Support for the Union

Paragraph 10 in the consolidated and amended complaint alleges that the Respondent interrogated employees about their support of the Union. The counsel for the General Counsel argues that Vega, in August, and Vallejo in August and October 7, 2016, interrogated workers at the Bronx facilities. The only evidence presented by the counsel for the General Counsel as to the alleged interrogation was through the testimony of Ubraez and Guance. The only alleged interrogation occurred with Ubraez was on an unspecified date in July 2016 and with Guance in September (GC Br. at 36, 37). No other workers testified as to any alleged interrogations by the Respondent regarding their union activities.

The lead Board case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

> Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

The Board determines whether an employer's questioning of an employee about union activity violates Section 8(a)(1) by considering whether, under all the circumstances, the interrogation would reasonably tend to restrain, coerce, or interfere with Section 7 rights. *Rossmore House*, above fn. 20 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among factors considered are: (1) the questioner's identity; (2) the place and method of interrogation; (3) the background of the questioning and the nature of the information sought; and (4) whether the employee is an open union supporter. *Scheid Electric*, 355 NLRB 160 (2010); see also *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (above factors described); *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002); also, *Intertape Polymer Corp.*, 360 NLRB 957 (2014).

Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011). When an employer tells employees that they will jeopardize their jobs, wages, or other working conditions by supporting a union or engaging in concerted activities, such communication tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000); *Bloomfield Health Care Cent*er, 352 NLRB 252 (2008).

In applying the totality of the circumstances test, and considering the context, I find the alleged interrogation of Ubraez and Guance about their union activities as not coercive and not a violation of Section 8(a)(1) of the Act.

It is alleged that in July 2016, Ubraez was approached by Vallejo regarding the status of a repair job and Ubraez replied that it would take time. It is then alleged that Vallejo asked if Ubraez had completed a union card and stated that he could be discharge and "thrown out" because he signed a union card. As I noted above, it is my belief that this incident never occurred or did not occurred as described by Ubraez. Again, there was no reason for Vallejo to interrogate Ubraez about signing a union card simply because Ubraez had already volunteered that answer to Vallejo, according to Ubraez.

It is alleged that Vallejo asked Guance a week prior to his discharge if he signed a union card and Guance replied in the affirmative. The counsel for the General Counsel alleges that this questioning was coercive. Vallejo denied that he observed or was aware that Guance received a union card from a union representative. Vallejo denied anyone told him that Guance signed a union card. Vallejo denied knowing that Guance had worn a union hat and/or shirt a week before his discharge (Tr. 466).

The counsel for the General Counsel argues that Guance's testimony is credible because Vallejo only provided a general denial (GC Br. at 37). However, if the event actually did not occur, I find that a general denial of a non-existent event as totally credible and it would difficult for a witness to provide a detailed explanation as to what happened if the event was a pure fabrication and had never occurred. For example, Vallejo denied knowing that Guance had worn a union hat or shirt and the counsel for the General Counsel questioned the credibility of his denial (GC Br. at 18). However, Guance never testified that he wore a union hat or shirt.[32] So, a simple denial from Vallejo of not knowing that Guance wore a union hat or shirt would suffice. Further, Guance had already testified that he was willing to lie or tell a falsehood about the truck accident. It is irrelevant that the falsehood was at the insistence of the driver or on his own volition. The clear testimony from Guance was his wiliness to provide an explanation for the accident that he knew was inconsistent as to what had actually occurred.

Further, if Vallejo and Vega were so concerned about the union organizing that they would interrogate Ubraez and Guance, there is no evidence that any other workers experienced the same inquiry from the Respondent. No other worker testified to corroborate the testimony of Ubraez and Guance of any interrogation over the signing of union cards. It is not reasonable to conclude that Ubraez and Guance, two disgruntled and discharged employees, were the only workers that the Respondent inquired of as to their union card signing.

As previously noted, the General Counsel failed to establish that Guance and Ubraez were any more credible witnesses than Vallejo or Vega. Moreover, the General Counsel failed to produce corroborating witnesses to overcome the deficits with the testimony of Ubraez and Guance. As noted above, the failure of the General Counsel to call identified corroborating

[32] The only witness who had described wearing a piece of union logo apparel was Bourgeios at the Bayshore facility.

witnesses may be a consideration in the judge's determination of whether the General Counsel's case has been significantly weakened, and thus a factor which leads to a finding that the General Counsel has failed to meet the burden of proof. See *Stabilus, Inc*., above, 841 fn. 19 (2010) ("The lack of corroboration from Lockridge weakens the General Counsel's case."). The Board has consistently held that the judge may consider the General Counsel's failure to call a potentially corroborating witness in deciding whether a violation of the Act has occurred. See *C & S Distribution,* above, 404 fn. 2 (1996) ("a judge may properly consider the failure to call an identified, potentially corroborating witness … as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred.").

I recommend dismissal of paragraph 10 in the complaint. As to the allegation in paragraph 10 of interrogations occurring in August, that allegation was not proven and is also dismissed.[33]

7. The Respondent did not Violate Section 8(a)(1) of the Act by Threatening Employees with Unspecified Reprisals for Engaging in Union Activities

Paragraph 9 of the consolidated and amended complaint alleges that Vallejo in July and Vega in August 2016 had threatened employees with unspecified reprisals because of their support for the Union. Again, this allegation centers over Ubraez' decision to voluntarily go upstairs to Vallejo's office and in the presence of Vega, Ubraez told Vallejo that he had signed a union card and whether that would cause of problem. In response, Vallejo tells Ubraez that this would depend on the point of view of the Company. The counsel for the General Counsel argues that this response was Vallejo's threat of unspecified reprisal. The second threat of unspecified reprisal occurred in August when Guance was in conversation with coworkers over working conditions and Vega walked by and allegedly stated to the group of workers that they should be careful in signing a union card. It is alleged that several days later, Vega repeated this threat when Guance was alone and that signing a union card could cause problems with the company (GC Br. at 37–40).

The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Rather, whether the statements are a threat is viewed from the objective standpoint of the employee, over whom the employer has a measure of economic power. See *Mesker Door, Inc*., 357 NLRB 591, 30 595 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008).

With regard to Ubraez, his own testimony demonstrated that he was not subjected to threats of unspecified reprisal. As noted above regarding the alleged interrogation of Ubraez, he clearly testified that "When I said that, that I had filled it (union card) out, and if there was a problem. He (Vallejo) said there's no problem. That would depend on the point of the view of

[33] See fn. 18 in GC. Br.

the company" (Tr. 188). In my opinion, that is not indicative of some future unspecified reprisal. According to Ubraez, Vallejo stated there would be no problem in signing the card.

With regard to Guance, he testified that after receiving his union card application, Guance spoke with his coworkers about the union cards during their break. They discussed conditions in the bathroom and their lack of paid vacation. Guance testified that Vega walked by and said to the workers that they "should be careful in signing the card." It has not been alleged that Vega said anything else. There were no additional comments by Vega as to promises or problems if the cards were signed by the workers. Guance said no one responded and they continue to eat their lunch. Guance said he received the union card 1 or 2 weeks after his initial encounter with the Union.[34]

Guance said that the next encounter with Vega over the union occurred 4 or 5 days later in August. Guance was again told by Vega to be careful in signing the union card and that Guance ". . . could have problems with the company". Guance said no one was present on this occasion. Guance said the comment made by Vega occurred inside the building in front supervisor's office (Tr. 88–89).

As noted in the record, Guance's signed union card was never produced by the counsel of the General Counsel or by the Union. Consequently, the only indication that Guance had engaged in union activity was through his own testimony. More significantly, when weighing the credibility of testimony between two individuals, it becomes apparent that in viewing the totality of the circumstances, the counsel for the General Counsel failed to subpoena other witnesses who could have testified and corroborate as to what exactly Vega stated as he allegedly walked by a group of workers. *Stabilus, Inc*., above; *C & S Distribution,* above. This would have greatly enhanced the credibility of Guance's testimony with corroborating testimony from several coworkers who were present at the time of the alleged threats. Further, as I find that Guance was prone to telling falsehoods in reporting the truck accident, his credibility is subject to question.

I recommend dismissal of this allegation in the complaint.

8. The Respondent did not violate Section 8(a)(1) of the Act When it Threatened Employees with Loss of Wages for Their Support for the Union

Paragraph 12 of the consolidated and amended complaint alleges that Da Silva threatened employees with loss of wages for their support for the Union.

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[34] I would also question whether a mere statement by an agent of the Respondent to "be careful in signing a union card" is even a threat of future unspecified reprisal. I would note that under Sec. 8 (c) of the Act:
(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Ubraez said that he was standing in front of 1111 Grinnell Place in July and observed from across the street that Da Silva was talking with the union representatives in front of 1120 Grinnell Place. Ubraez said that he did not understood what was being said because the parties were talking in English. Ubraez said that Da Silva approached him and two other workers while they were working inside 1111 Grinnell Place. It is alleged that Da Silva told the three workers that ". . . we were going to be dumbasses because we had to pay the union to represent us. That could also provoke the lowering—the diminishing of our salary." Ubraez said that no one responded to the comment (Tr. 193, 194).

This is the only incident alleged by the counsel of the General Counsel of a threat with loss of wages made to employees for their support for the Union. The General Counsel argues that Ubraez' testimony should be credited because it was straight forward and the Respondent failed to call Da Silva as a witness to rebut this allegation. No adverse inference is drawn of the failure of the Respondent to call Da. Silva as a witness.[35] Having found that Ubraez' testimony cannot be accepted at face value, I now find that the failure of the counsel for the General Counsel to call the two corroborating coworkers who were present when the alleged threat was made is telling that this incident never occurred. I find, even assuming that this single, isolated remark was made by Da Silva, that the remark made was not a threat. Da Silva gave the workers his opinion that having a union could provoke the lowering of wages. According to Ubraez, Da Silva did not state that a union shall lower their wages or that the Respondent will lower their wages if the Union came in.

I recommend dismissal of this allegation in the complaint.

The Discharge of Rafael Rosario Guance and Jose Luis Ubraez

Paragraph 13 of the consolidated and amended complaint alleges that Rafael Rosario Guance and Jose Luis Ubraez were discharged to discourage membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. Section 8(3) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities of the purpose of collective bargaining or other mutual aid or protection." Section 8(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992).

[35] A party's failure to explain why it did not call the favorable witness may support drawing an adverse inference. See *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). Ultimately, however, the judge has discretion to decide whether an adverse inference is warranted when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. The Board and the Federal courts have also consistently held that it is not an abuse of discretion if the judge decides not to take an adverse inference against a party for not calling a witness even if that witness is the party's former supervisor. *Advocate South Suburban Hospital v. NLRB*, 486 F.3d 1038, 1048 and fn. 8 (7th Cir. 2006).

In assessing Respondent's motive, this case is no different than any other 8(a)(3) case. The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees' protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line, 251* NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.,* 338 NLRB 644 (2002).

The *Wright Line* test requires the General Counsel to make a prima facie sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Unlawful motivation is most often established by indirect or circumstantial evidence, such as suspicious timing and pretextual or shifting reasons given for the employer's actions. Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge or refusal to hire and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge and proximity in time between the employees' union activities and their discharge. *W. F. Bolin* Co. *v. NLRB,* 70 F. 3d 863,871 (6th Cir. 1995).

The General Counsel has the burden to establish a prima facie violation of Section 8(a)(3) case and must show that 1) the employee engaged in protected activity, 2) the employer had knowledge of that activity, and 3) the employer bore animus towards the employee's protected activity. Recently, the Board went further by stating that the General Counsel need not make a particularized showing of animus toward any specific instance of protected activity, but merely union animus in general. *Commercial Air, Inc.*, 362 NLRB No. 39 (2015). Once the General Counsel satisfies all three prongs—thereby proving that the union-related conduct was a "motivating factor" in the employer's termination decision—the burden shifts to the employer to prove that "the same action would have taken place even in the absence of the protected conduct." *Wright Line* at 1087.

9. The Respondent did not Violate Section 8(a)(3) and (1) of the Act when it Discharged Rafael Rosario Guance

The Board found that where employees have lied to their superiors, the *Wright Line* test applies only after an initial two-step inquiry: (1) whether Respondent had a good-faith belief that the employee engaged in the misconduct and (2) if Respondent had such a belief, whether the employee in fact engaged in the misconduct. See *Integrated Electrical Services*, 345 NLRB 1187 (2005). If a good faith belief exists, *Wright Line* then applies. Here, there is a good-faith belief by the Respondent that Guance had engaged in misconduct, i.e., lying, and there is no dispute in the record that Guance had in fact engaged in lying.

Guance testified that he first met the union representatives on Garrison Place and 156 Street at 6:30 in the morning on an unspecified date in August. He testified that no one else was in the vicinity except for the union organizers and himself (Tr. 76–78). Guance testified that he met with the union representatives a second time one or two weeks later in August on Garrison

and Grinnell Place. Guance said he was standing near 1120 Grinnell Place. Guance said there were six or seven coworkers present at this second encounter. On this occasion, Guance received a union card from an unidentified union representative and he proceeded to place the card application in his pocket and continued his walk to work. Guance did not testify that he had any conversations with the union representatives or with his coworkers. Guance said he signed the card at home and mailed it to the Union the following day. Guance said he did not sign the card on the spot because he observed Vega was looking at him in an "unusual way" for 5 minutes from across the street and approximately 20 feet away. Guance insisted that Vega had an "accusatory face" and that it was not his normal expression. However, Guance admitted that Vega was taking a smoke break and that he would oftentimes work outside the building or cross the street to work at the other warehouse (Tr. 77–81, 113–115, and 122–130).

On the same day, after receiving his union card application, Guance said he spoke with the other workers about the union during their break. They discussed conditions in the bathroom and their lack of paid vacation. Guance testified that Vega walked by and said to the workers that they "should be careful in signing the card." Guance said he received the union card 1 or 2 weeks after his initial encounter with the Union.

Guance said that the next encounter with Vega occurred 4 or 5 days later in August. Guance was again told by Vega to be careful in signing the union card and that Guance ". . . could have problems with the company." Guance said no one was present on this occasion.

Guance testified to a third occasion, this time with Vallejo, approximately a week prior to his discharge. Guance said he went into Vallejo's office regarding a business invoice and during their conversation, Vallejo asked if he had signed the union card. Guance responded, "yes." Vallejo did not say anything and Guance then left the office.

Vallejo testified that he did not know that Guance supported the Union. Vallejo denied that he observed or was aware that Guance received a union card from a union representative. Vallejo denied anyone told him that Guance signed a union card. Vallejo denied knowing that Guance had worn a union hat and/or shirt a week before his discharge (Tr. 466).

Vega said that he smokes but denied that he observed Guance meeting with the union representatives on Grinnell Place or that anyone handed him a union membership application. Vega said that he never observed Guance speak to the union representatives during the times he was on a smoking break. Vega denied that he spoke to Guance or to a group of workers about Guance signing a union card and denied telling them "to be careful about signing a union card."

In my opinion, it is questionable whether Guance had engaged in activities in support or on behalf of the Union. It is also my opinion that the Respondent had no knowledge of Guance's alleged union or concerted activities.

Clearly, there has been no testimony that Guance engaged in any activity on behalf of the Union. There has been no testimony that Guance distributed union handbills, distributed or collected signed union cards or had encouraged other workers to meet with the union representatives. It has been alleged by the counsel for the General Counsel that Guance and his coworkers discussed the benefits of a union during a work break when Vega walked by and told

them to be careful about signing a union card. However, as noted above, I find that this incident never occurred because I did not credit Guance's credibility on this point and the counsel for the General Counsel never presented witnesses that would have corroborated Guance's testimony. It is also questionable as to whether Guance supported the Union by signing a union card because Guance's signed union card was requested by the Respondent's counsel, but never produced by the counsel for the General Counsel or by the Union.

I also find that the Respondent did not have knowledge of Guance's union activities. Guance testified that he was only observed by Vega. There has been no testimony that Guance was allegedly under surveillance by Vallejo when Guance met with the union representatives. Guance testified that no one was around in his first encounter with the union representatives. None of the union representatives testified that they were present in August and had observed Vega engaged in surveillance of workers receiving and signing union cards. Guance testified that Vega had an "accusatory face" and his face was "not normal" when Guance accepted a union card application. No other description of Vega's demeanor or facial expressions was elicited by the counsel for the General Counsel. It is simply beyond my understanding, without more, to fathom what it means to have an accusatory face or an abnormal face.

In my opinion, the counsel for the General Counsel has failed to show that Guance engaged in union and/or concerted activities and that the Respondent had knowledge of such activities. Without having engaged in union or concerted activities and without knowledge of such alleged activities, I find that the counsel of the General Counsel failed to establish that the Respondent bore any animus with regard to Guance's alleged activities in support and on behalf of the Union.

Now, turning to his discharge, Guance was the assistant to truckdriver Germosen on September 6 when Germosen stuck his truck on a pillar at the entrance to a client's facility. Instead of truthfully reporting the accident as it actually occurred, Germosen allegedly implored Guance to lie and report that the truck was in a "hit and run" accident with another truck. Initially, Guance responded no, but Germosen convinced him to report that the damaged was caused by another vehicle. Guance said that he was called by Vega to meet Vallejo in his office on September 7. While in the office, Vallejo asked what had happened the previous evening. Guance replied that another truck had crashed into them. Guance testified that he knew his statement to Vallejo was false, but said that Germosen told him that if he didn't say what was in the fake accident report, Guance could have problems with the company. Guance testified that "I couldn't contradict the report with the report that they gave me." Guance then went back to work, but was recalled by Vega to Vallejo's office. When Guance arrived, he was shown a document to sign and was told he was being fired.

According to Vallejo, Guance told him that the truck was hit by another truck causing the accident. Vallejo testified he did not believe Guance's story because the damage to the truck was inconsistent with a head on collision with another truck. Vallejo said that he spoke to Germosen about 10 minutes later. Vallejo asked him what had happened and Germosen confessed that he had driven the truck into a pillar at the client's facility. Vallejo said he suspended Germosen for the accident. Vallejo said that he then called Guance back to the office. At this point, Guance was given a ". . . chance to come clean" over the accident, but Guance insisted that another truck had hit his truck. Vallejo said that Guance was then discharged for lying.

The counsel for the General Counsel argues that Guance was disparately treated due to his union activities because Germosen, who had actually caused the damage to the truck, was only suspended whereas Guance was discharged (GC Br. at 48, 49). However, I credit Vallejo's testimony and the record clearly shows that Guance was discharged and Germosen was not because Germosen told the truth and Guance continued to lie after given a chance to tell the truth (Tr. 464, 465).

It is clear from the record that Guance and Germosen had initially failed to tell the truth during their phone conversations with Vallejo and Vega over the damage to the truck.[36] It is also clear that when Germosen was asked a second time on the following day as to what had happened, Germosen confessed and said that his truck had struck a pillar. Although Germosen did not testify, this chain of events more likely than not occurred as described because Guance gave corroborating testimony that he was also given a second opportunity to tell the truth on the following day. Guance testified (Tr. 95)

> Q. Okay. What did Vallejo ask you when you arrived in his office?
> A. I told him that another truck from Hinski had crashed into us.

On cross-examination, Guance testified (Tr. 108)

> Q. So, I'll ask you again. In that first meeting did you lie to Vallejo and Vega about the accident, yes or no?
> A. Yes.

The record is devoid of any discharges taken by the Respondent when a worker lies about a work-related event (GC Exh. 25) as to show a past practice or policy with regard to disciplining such workers. Consequently, it becomes critical to carefully analyze the differences between Guance and Germosen. Germosen's situation is clearly distinguishable. Contrary to the argument of the counsel for the General Counsel (GC Br. at 48), Guance was indeed given an opportunity to provide a truthful response before his discharge. Guance was treated no differently than Germosen by Vallejo. Guance did not tell the truth until the third time when he was confronted with his termination. While Germosen lied over the phone, he told the truth when he met with Vallejo. While Guance also lied over the phone, he continued to insist that the truck was hit by another vehicle when he first met with Vallejo. Guance did not confess to the truth until the third time when confronted with his discharge.

I recommend dismissal of this allegation in the complaint.

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[36] Guance did not testify that he had a phone conversation with Vega following the accident. However, I credit Vega's testimony that Guance told him over the phone on the day of the incident that it was a "hit and run" accident by another truck.

10. The Respondent did not Violate Section 8(a)(3) and (1) of the Act When it Discharged Jose Luis Ubraez

Ubraez was discharged on October 17, 2016. The Respondent argues that Ubraez had a history of mediocre job performance resulting in his discharge. The discharge notice, dated October 14 (GC Exh. 15 and 5), stated

> Lack of job performance. Negative attitude when told to perform job assignments. Being disrespectful to co-workers.

Vallejo testified Ubraez did a mediocre job as a mechanic. He said that Ubraez would take a long time in repairing the trucks and felt that Ubraez was "just killing time" when a ten minute job took him over three hours to complete. Vallejo stated that Ubraez has been counseled before about his performance by Vega and Ubraez was previously suspended for ten days (March 3–14, 2016) for failing to follow a direct order to obtain auto parts for a truck. Vallejo said he asked Ubraez two or three times to obtain the parts, but he refused.[37]

Vallejo testified to another example of Ubraez' poor job performance. Vallejo said that on October 4, he was instructed to repair the headlights of one of the trucks. Truck driver Gustavo Moya reported that the light was damaged in the morning before the trucks went on their routes. Vallejo stated that the trucks are usually out by 7:30 a.m. and that Ubraez had not finished the job until 10:30 a.m. Vallejo said that the job should have taken Ubraez to repair in ten minutes. Moya corroborated Vallejo's testimony on the amount of time Ubraez needed to repair the lights on his truck in October 2016. Moya had to report to Vega that he couldn't take the truck out because of the repairs. Moya said that Vega instructed Ubraez to work faster on the repairs, but Moya said he was unable to leave until 10:30 a.m.

Ubraez admitted he was suspended for 3 days in 2016 for refusing a job assignment to obtain some auto parts. Ubraez said that he was suspended for another week when he returned from his 3 day suspension. Ubraez does not dispute that he served the suspension. The Respondent stated that Ubraez was suspended in March. Ubraez believed the suspension was in May (Tr. 216). In any event, it was clear that the discipline occurred prior to the Union organizing campaign in early June.

Vallejo said that Ubraez' performance on the job was so poor that he began looking for his replacement in March after Ubraez was suspended for ten days. As noted above, the timing of searching for a new mechanic is highly relevant since it shows that the Respondent was seeking a replacement for Ubraez prior to the union organizing campaign. Vallejo said that he was considering another mechanic named Alejandro Lopez to replace Ubraez and Lopez started as the replacement mechanic shortly after Ubraez' termination.

[37] Ubraez claimed he never received the suspension notice and that the signature on the notice was not his (GC Exh. 16). Nevertheless, it is not disputed that Ubraez served the suspension. It is also not disputed that Ubraez refused to obtain the auto parts after repeatedly directed by Vallejo.

In *Mid-States Express*, 353 NLRB 864, 883 (2009), the Respondent was charged with unlawfully discharging six employees for their support of the union. Employee Steven Wilson's discharge is of particular import. Respondent claims that Wilson was a "substandard employee" with a list of infractions over two years including sexual harassment, damaging freight, excessive absenteeism, and accidents/crashes. As in this situation, at no point over that period did Respondent view Wilson's "overall performance/attendance problems to be sufficiently serious as to merit his termination . . . Respondent was not overly troubled by this infraction, at least not to the point of discharging him. The Respondent has offered no explanation as to why, having allowed Wilson to continue working despite these past infractions, it chose to abruptly terminate Wilson on March 21, without providing a reason or explanation for doing so." The judge in *Mid-State Express* found that it was only Wilson's attendance at a union meeting earlier in the month that could have prompted the company's sudden change of heart.

Likewise, there is no significant event in the record that would have triggered Ubraez' discharge. He had received a "Problem Definition" form in March 2016 that said, "Employee shows blatant disregard for supervisor's direction, has a poor work attitude/ethic, shows disrespect for his supervisor and fellow employees" (Tr. 218–219). Ubraez also received a suspension in March 2016 (or May as contended by Ubraez) after refusing to pick up certain parts for the truck. As in *Mid-States Express*, none of these infractions led to his termination. However, unlike *Mid-States* Express, there is nothing to substantiate that Ubraez engaged in activities in support or on behalf of the Union that would trigger his termination. Further, an employer may defeat the insinuation that its firing decision was driven by union animus. In October 2016, Ubraez allegedly took several hours to repair a truck light, which could be seen as the triggering moment of poor performance. I find that the Respondent's version of this event was more credible since it was corroborated by Moya's testimony.

Finally, it is important to consider the point in time when an employer notices the employee's union support. In *Terraprise Holdings*, 363 NLRB No. 68 (2015), the Board found that an employee's discharge was lawful, and that he should not be reinstated, when the employer expressed concern over his poor performance before it knew about his protected concerted activities. In that case, Matthew Schmidt was a top performer at a recruiting firm. However, his ratings began to slip and his supervisor sent e-mails to the corporate office as early as October 2012, asking how he should deal with Schmidt's "poor performance, attitude and attendance." It was not until two months later that Respondent became aware of Schmidt's protected activity (he participated in a former co-worker's unemployment hearing). So, although the General Counsel in *Terraprise* had met its initial *Wright Line* burden, Respondent was able to show it would have terminated Schmidt regardless of his protected concerted activities. Union animus was therefore not the motivating factor in the discharge.

In the instant case, Ubraez had been reprimanded and suspended by his superiors as early as March 2016—at least three months prior to the beginning of the union's campaign. Although this March 2016 suspension time frame is disputed evidence, Ubraez admitted that he was in act suspended but places his suspension in May 2016. Like *Terraprise Holdings*, the Respondent was on the path to terminating Ubraez prior to and regardless of his union activities. Vallejo credibly testified that he was seeking another mechanic to replace Ubraez. Any doubt of this is erased under *Mid-States Express* since Respondent is able to point to a poor performance event close to the October 2016 date when Ubraez was finally discharged. Both Vallejo and Moya

testified to an incident in early October where Ubraez took hours to repair a broken light on one of the trucks. Ubraez recalled this event but believed it took place in July. The testimony of Vallejo with corroboration by Moya supports Respondent in this instance.

Under *Wright Line*, assuming the counsel for the General Counsel made a *prima facie* case, the Respondent has proven via its constant discipline of Ubraez that began prior to the Union organizing that it would have discharged him regardless of his union activities (which I find that the Respondent disputes any knowledge of such activity).

11. The Respondent violated Section 8(a)(1) of the Act by Instructing Employees to Sign a Petition Revoking Their Support for the Union at the Bayshore Facility

Paragraph 14 of the consolidated and amended complaint alleges that the Respondent, by its agent, Mongelli, instructed employees in January and/or February 2017 to sign a petition to revoke their support for the Union in violation of Section 8(a)(1) of the Act.

Bourgeios testified that he was approached by Mongelli on the work floor on February 27, 2017. Bourgeios was asked by Mongelli to go to his office to sign a document. Bourgeios did as instructed and he was then presented with a petition and Mongelli asked him to sign the petition. The petition was for the workers to revoke their support of Local 1931. Bourgeios said he only read the first two lines of the petition and left the office. Bourgeios said he was "curious" what the rest of the petition stated and returned to Mongelli's office to read the rest of the document, but when Bourgeios returned, there was only a Spanish version of the petition. Bourgeios said he made a copy of the Spanish-version of the petition.

The English version of the petition (GC Exh. 12) states

> The undersigned employees do not wish to be represented by the Union Amalgamated Local 1931 AFL-CIO Affiliated with I.U.A.N. Union. They do not want to join the Union and do not want to support the Union whatsoever.
>
> In the event that some of the undersigned have previously signed at any point an authorization card or have indicated somehow a support for union representation, the undersigned hereby revoke that card effective immediately. More specifically, our Employer, the Union and any third parties or arbitrators are hereby NOTIFIED that any of the cards that had been signed by any of the undersigned are here annulled and render without effect.
>
> In the event that at some point our Employer recognizes the union as the bargaining representative of the employees, we the undersigned, hereby, ask the National Labor Relations Board to conduct a decertification election to determine if the majority of the employees wish to be represented the Union.

Under established Board law, an employer may provide only ministerial or passive aid to employees who wish to withdraw from union membership. *Chelsea Homes*, 298 NLRB 813, 834 (1990), enfd. mem. 962 F.2d 2 (2d Cir. 1992). Thus, the employer may lawfully provide neutral

information to employees regarding their right to withdraw their union support, provided that the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere "wherein employees would tend to feel peril in refraining from [withdrawing]." *Mohawk Industries*, 334 NLRB 1170, 1170–1171 (2001), quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999); *Erickson's Sentry of Bend*, 273 NLRB 63 (1984) (unlawful solicitation of union resignation where employer assisted in gathering signatures on petition to withdraw union membership); see also *Landmark International Trucks, Inc*., 257 NLRB 1375 (1981), vacated and remanded 699 F.2d 815 (6th Cir. 1983), affd. 272 NLRB 675 (1984), enf. denied 775 F.2d 148 (6th Cir. 1985); cf. *Mid-Mountain Foods*, 332 NLRB 229, 231 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001) (no violation where employer neither assisted employees nor tracked their responses).

Inasmuch as Mongelli did not testify, I find that Bourgeios' testimony has not been rebutted that he was instructed and directed by Mongelli to sign the petition, I find that the Respondent violated of Section 8(a)(1) of the Act when Bourgeios and ostensibly, other workers were instructed to review and sign a petition revoking their support of the Union at the Bayshore facility. Even assuming that Mongelli did not instruct Bourgeios to sign the petition, it is clear that the Respondent violated the Act when such a petition was drafted by the company. The Respondent provided more than ministerial or passive aid to employees who wish to withdraw from union membership. The record shows that the petition was not initiated by the workers or that the petition was prepared by the Respondent at the request of a worker. The identity of the workers who support the Union would be evident since their names would not be on the petition. This would give the Respondent a clear idea as to whether a majority of Bayshore workers supported or did not support the Union.

The situation in this case is similar to cases where the Respondent attempt to monitor its employees' responses to the letters by requiring the sample resignation letters to be requested directly from management. This put the Respondent in the position of knowing exactly which employees chose to resign their union membership—a fact obvious to employees—and thereby further pressured employees to make that choice. See *Corrections Corp. of America*, 347 NLRB 632, 633, 639 (2006) (employer posted memo regarding how to decertify union and implying that employer would know which employees signed or did not sign such a petition). The Board has found this procedure inconsistent with employees' Section 7 rights and not mitigated by assurances against reprisal for not signing the petition. *Adair Standish Corp*., 290 NLRB 317, 318 (1988), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990). *Space Needle, LLC and UNITE HERE! Local 8 and Julia Dube*. Cases 19–CA–098908, 19–CA– 098988, 19–CA–098936, 19–CA–108459, 19–CA–107024 January 30, 2015.[38]

[38] Bourgeios also testified to four meetings mandated by the Respondent when labor consultants allegedly criticized the benefits of having a union and of an incident when Bourgeios was remanded by a supervisor for wearing a union logo cap. However, these allegations were not part of the consolidated and amended complaint. The counsel for the General Counsel was adept in amending the complaint on several occasions but choose not to move these allegations in the complaint as separate violations. As such, no determination is made as to whether the meetings at the Bayshore facility and Bourgeios' encounter with Supervisor Martindale were violations of the Act.

Based upon my review of the record, I find and conclude that the Respondent violated Section (a)(1) of the Act when it instructed workers at the Bayshore facility to sign a petition to revoke their support for the Union.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Arbor Recycling, Arbor Lite Logistics, a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Amalgamated, Local 1931, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on about February 27, 2017, when it instructed workers at the Respondent's Bayshore facility to sign a petition to revoke their support for the Union.

4. The Respondent did not otherwise violate Section 8(a)(3) and (1) of the Act as alleged in the consolidated and amended complaint.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Arbor Recycling, Arbor Lite Logistics, Bronx, New York, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing workers at the Respondent's Bayshore facility to sign a petition that would revoke their support for and on behalf of the Union.

[39] If no exceptions are filed as provided by Sec. 102.46 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its existing properties at the facility located at 135 Pine Aire Drive, Bayshore, New York, copies of the attached notice marked "Appendix"[40] in the English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 26, 2018

Kenneth W. Chu
Administrative Law Judge

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT instruct, direct, or otherwise have our employees at the Bayshore New York facility to acknowledge and/or sign an employer petition revoking our employees' support on behalf of the Amalgamated Local 1931 or any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ARBOR RECYCLING/ARBOR LITE LOGISTICS,
A SINGLE EMPLOYER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Hours of Operation: 8:45 a.m. to 5:15 p.m.
212-264-0300

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-180470 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0344.